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Supreme Court, U.S.

E I L E D

JUL 9 1990

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CLERK

IN THE

Supreme Court of the United States

October Term, 1990

NO. _____

WILLIAM HOWARD CROSS, SR.,

PETITIONER,

VS.

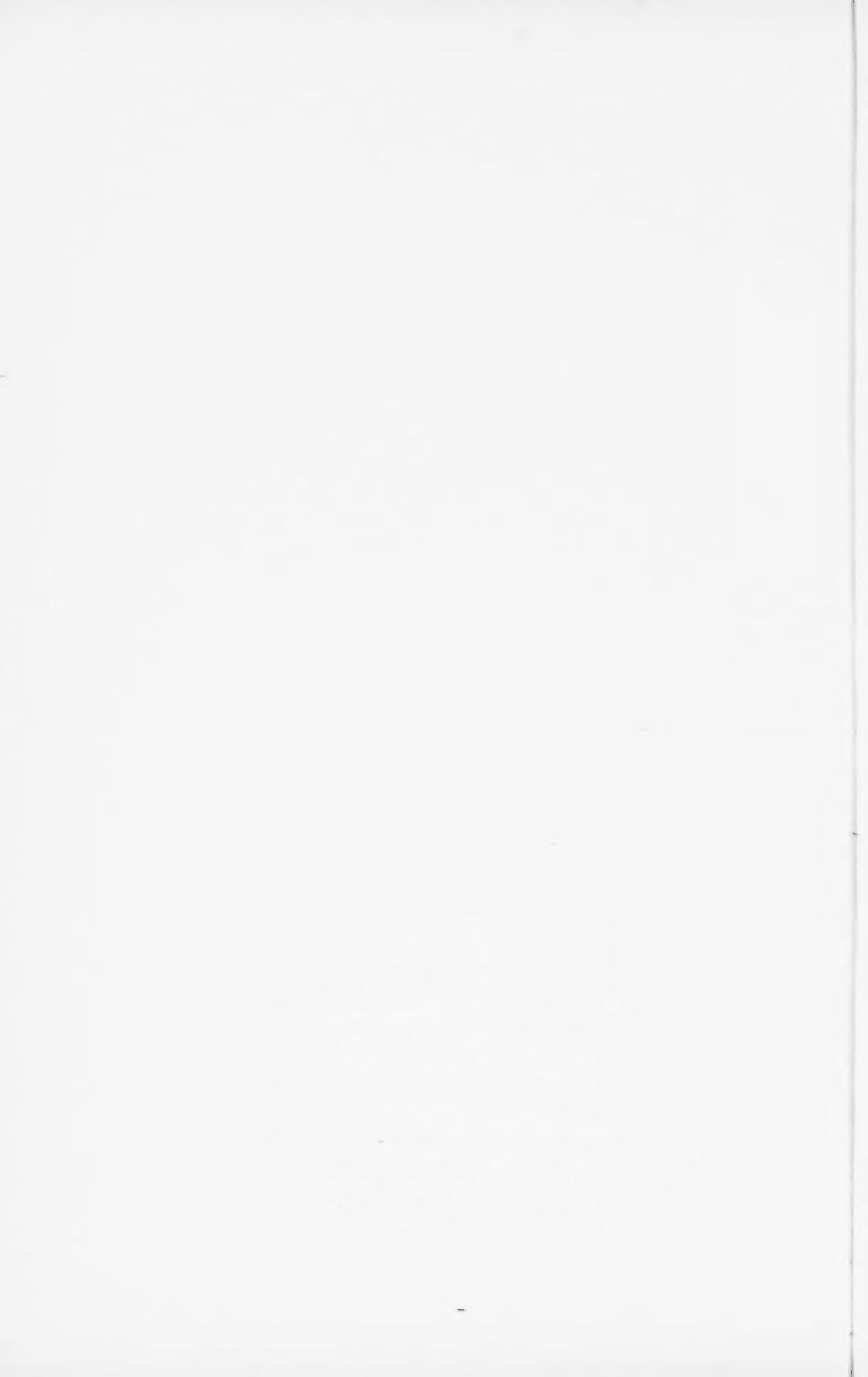
UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Should the Eleventh Circuits decision sub judice, creating the doctrine of fortuitous dialogue, be allowed to stand when the same clearly circumvents this Courts mandate in Faretta v. California, 422 U.S. 806, (1975)?



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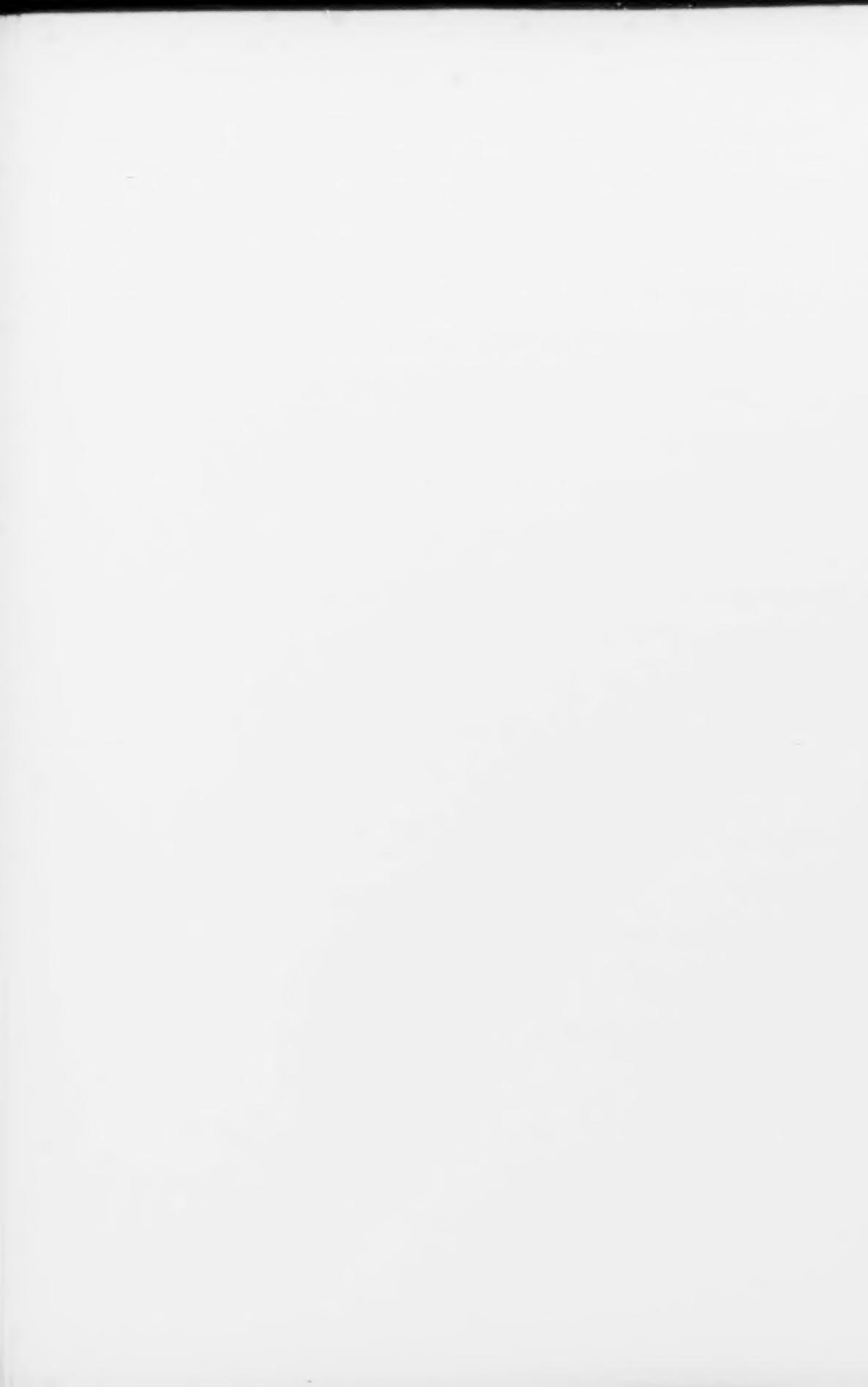
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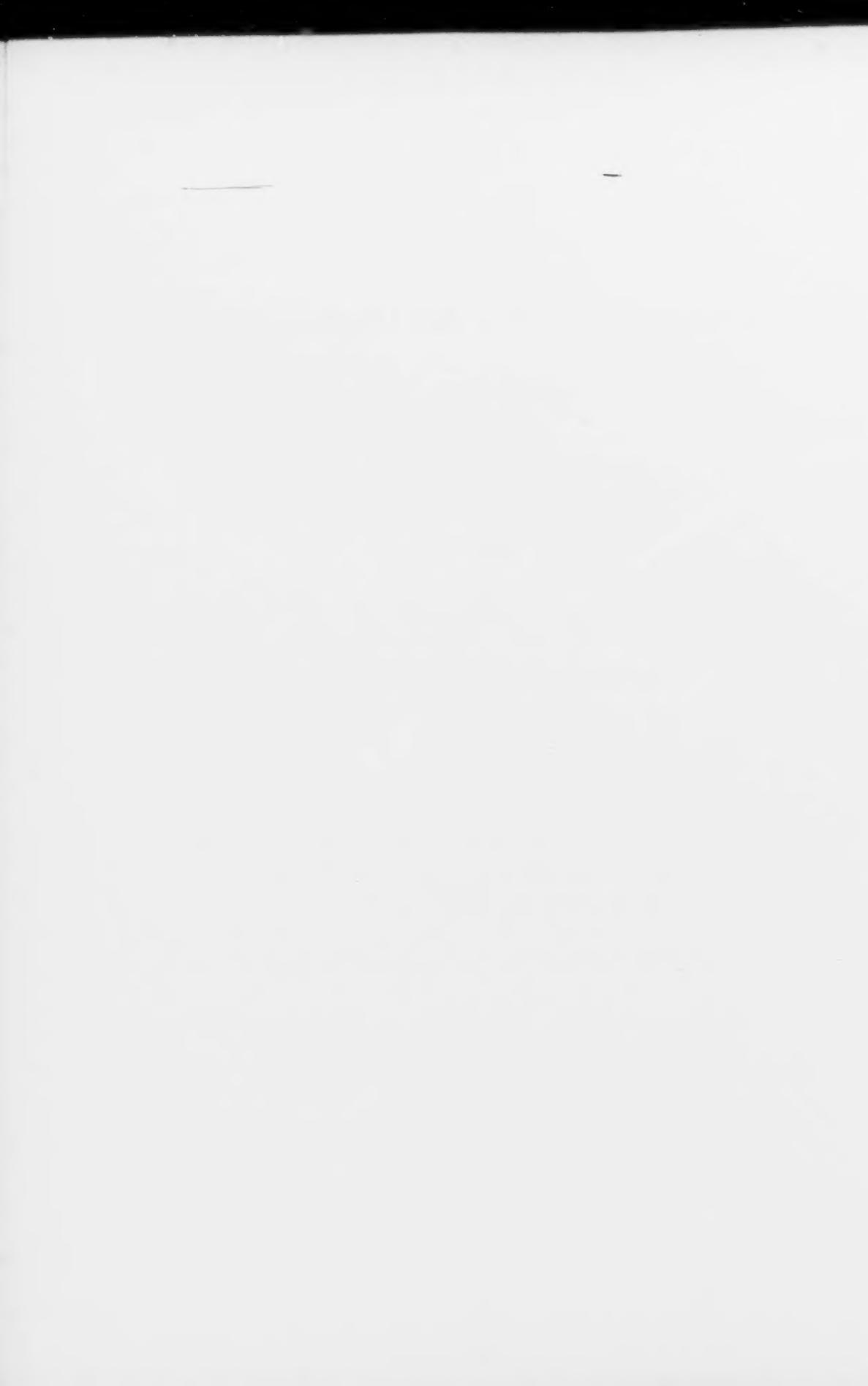
**WILLIAM HOWARD CROSS, SR.,
PETITIONER,**

VS.

**UNITED STATES OF AMERICA,
RESPONDENT.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Petitioner, William Howard Cross, Sr., respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit refusing Petitioners request to represent himself absent a "Faretta type" hearing, when the record clearly indicates right to self-representation invoked in clear and unambiguous manner.



OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Cross, 893 F.2d 1287; 1990 U.S. App. LEXIS 1770, and appears in Appendix A to this petition. The unpublished Order of the District Court for the Middle District of Georgia appears in Appendices B, C, to this petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on January 30, 1990. A timely petition for Rehearing was filed on February 26, 1990. The Court of Appeals denial of the Petition for Rehearing was issued on April 10, 1990. This Court's jurisdiction is invoked under Title 28, U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution is set forth in Appendix D.



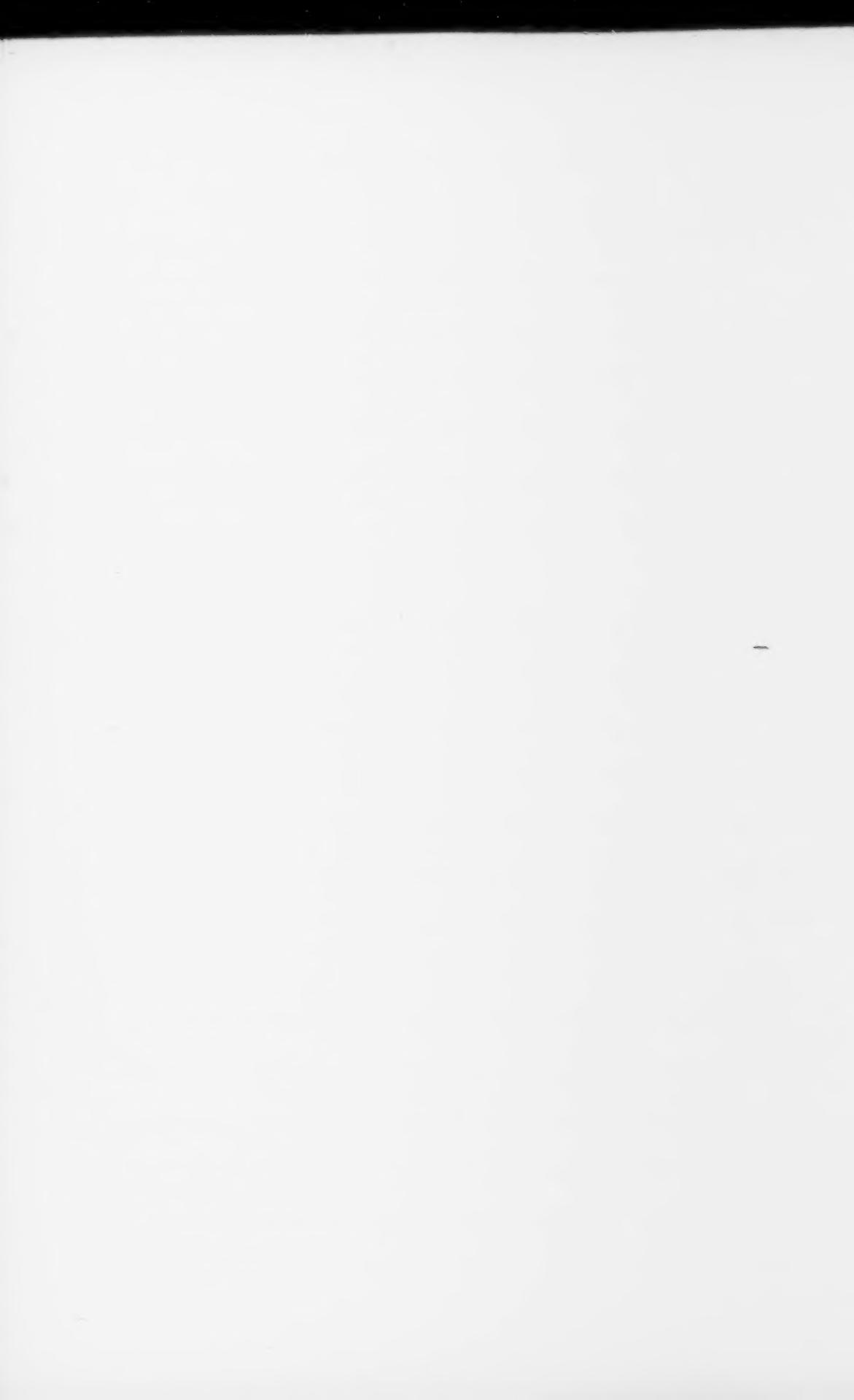
STATEMENT OF THE CASE

1. Procedural Posture

The Petitioner, William Howard Cross, Sr. (herein-after referred to as "Cross") was convicted by a trial by jury on September 18, 1981. This conviction was initially reversed; United States v. Cross, 708 F.2d 631 (11th Cir. 1983); but that decision was vacated, United States v. Cross, 468 U.S. 1212, 104 S.Ct. 3580, 82 L.Ed. 2d 874 (1984).

On June 21, 1985, Cross, filed a pro se motion under 28 U.S.C. section 2255 challenging the validity of his conviction and twenty (20) year prison sentence on Criminal Indictment 80-1016-COL. Additionally, Cross filed a Motion For Evidentiary Hearing and Motion For Liberal Construction of Pleadings, both were filed on June 21, 1985. Cross also filed a timely Certificate of Service on counsel for the Government.

After some two-and-a-half years had passed without any response from the Court or the Government, Cross retained Attorney Herbert Shaffer. Attorney Shaffer, filed another Motion under 28 U.S.C. section 2255 on December 8, 1987. This Motion, too, went unnoticed by the Court and the Government. Subsequently, on January 27, 1988, Attorney Shaffer, filed a



Motion For Entry of Default and Issuance of Writ. Also filed were a Motion to Consolidate the previous Motion under 28 U.S.C. 2255 which the District Court allowed.

By letter dated February 17, 1988, the District Court directed the Government to respond to the Motions.

On August 16, 1988, the District Court denied Cross' Motion under 28 U.S.C. 2255, without a hearing. On August 26, 1988, Cross filed a Motion For New Trial and For Reconsideration and For Supplementation of the Record. On November 18, 1988, the District Court allowed the Supplementation of the Record but denied the Motion For New Trial and For Reconsideration.

On November 28, 1988, Cross filed a Notice of Appeal. Petitioner argued before the Court of Appeals for the Eleventh Circuit that the District Courts summary denial of his right to self-representation violated his rights under the Sixth Amendment to the United States Constitution; that he was denied effective assistance of counsel, for counsel's failing to object to this and other errors at trial and failure to raise same on direct appeal.



The Eleventh Circuit Affirmed the decision of the District Court on February 7, 1990, and Denied Cross' Petition For Rehearing In Banc on April 10, 1990.

2. Dialogue and Synopses of Colloquy between District Court and Cross (T.T. IV, 7, 8)

From the beginning Cross clarifies his appointed counsel's misstatement of what he wanted and clearly invoked his right to self-representation:

Mr. Cross: Mr. Oates said I wanted to address the jury on the opening. I want to be allowed to represent myself through this whole trial.

The Court reacts with astonishment:

The Court: You want what?

Cross reiterates his desire to proceed pro se:

Mr. Cross: To represent myself.

The Court summarily denies this request and threatens Cross with trouble:

The Court: No, now Mr. Cross, we have got to have an understanding. I can see right in the beginning. I don't want any trouble about it all.

Cross assures the Court that he will not cause any trouble:



Mr. Cross: There won't be any.

The Court puts the burden of trouble on Cross' back, in so many words, the Court makes clear to Cross that if he keeps up with his request to proceed pro se, he will be in contempt of Court or have some kind of trouble:

The Court: Whether there is or not will depend on you. You are represented by a lawyer, Mr. Oates. Mr. Oates is your lawyer. Anything that has to be said should come from Mr. Oates and not from you. You are the Defendant in the case. You are not the lawyer in the case. Mr. Oates represents you. Any communication to the Court should come from Mr. Oates. Any communication to the Jury should come from Mr. Oates. *You are not to represent yourself.* You are represented by counsel I want that understood in the beginning. I don't want you and the Court to have any difficulty about it. Whether we do have any difficulty about it or not is going to depend on you. (emphasis added)

Cross responds to the Court's threats and reiterates that he will not cause any trouble. Cross tries to explain some of his reasons for wanting to proceed pro se and how serious the case is. Cross explains his situation at the jail and his inability to prepare his case or communicate with his court appointed counsel. Cross tries to appease the court and explains that he will not be making frivolous motions or trying to cause trouble:

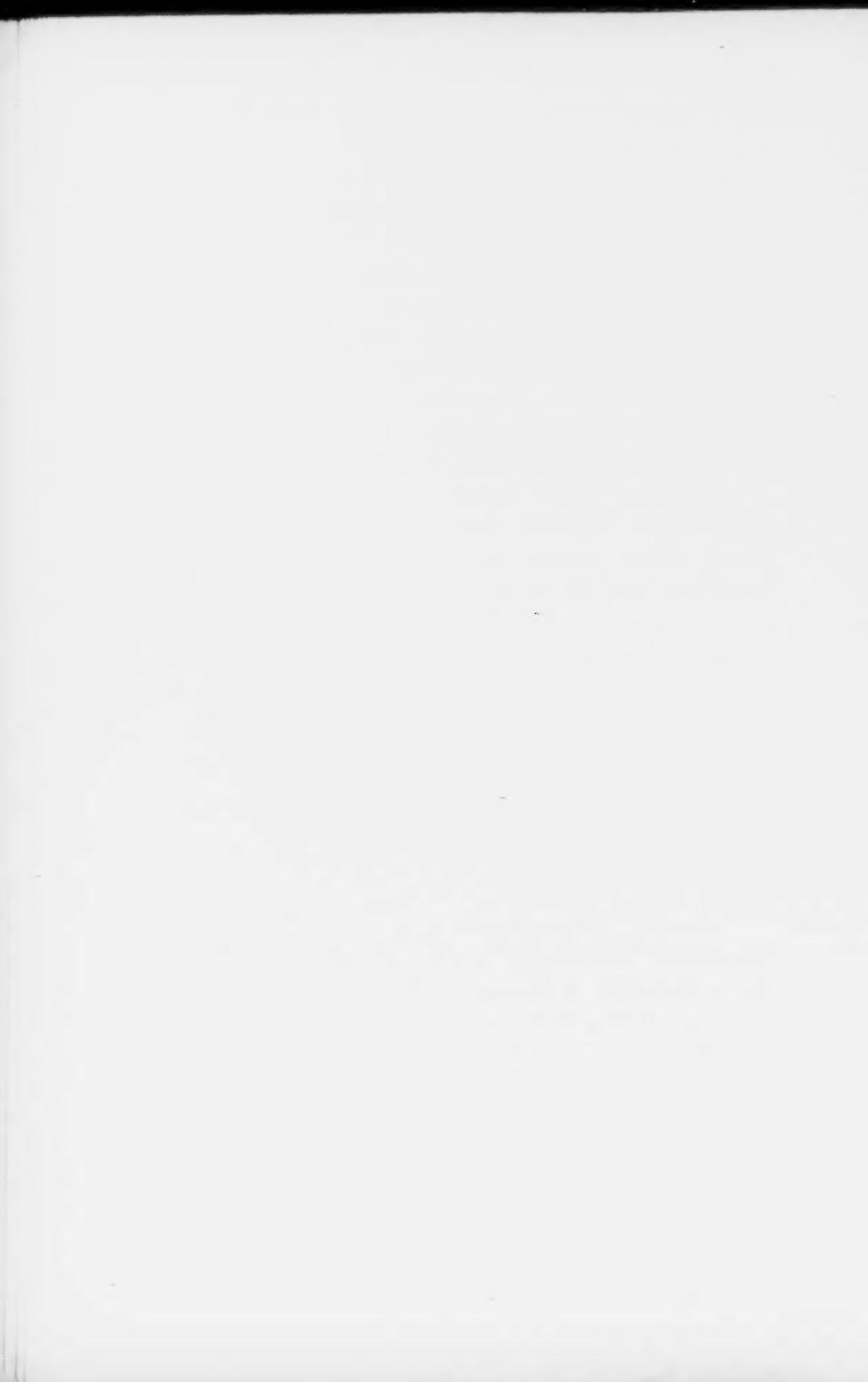


Mr. Cross: You won't have any difficulty. I would like to make the statement. Mr. Oates was appointed to represent me. A case like this, where the Government has had a year to work on it and all the resources in the world to work with and to try to put me in the penitentiary and here I have a lawyer that's appointed to me. I'm sitting in jail over there with no telephone, the letters I write don't get out, no way to communicate with anyone. I see my attorney five or six times at the most in this case. One time for five minutes, another time for -- he comes over there and talks to me and they run him off. He stays 25 minutes, can't bring anybody up there to talk with me. I have no proper way to defend myself. This man cannot possibly know as much about the case as I know. I would - I'm not talking about getting up and making Motions and everything else, I'm talking about I would like to address the Jury on the opening statement and talk with the attorney and make statements to the Court and to you, Your Honor. I have - I'm fighting for my life.

The Court ignores the previously asserted right to self-representation and tries to convince Cross not to address the Court anymore:

The Court: Mr. Cross, you will have ample opportunity during the course of the trial to consult with your attorney. You are not to address the Court once we begin the trial of this case. You are not to address the Jury. Communications will be through your lawyer. That's all I want to have an understanding about.

Cross knows that he has been denied his constitutional right to proceed pro se and puts it own record:



Mr. Cross: *You are taking my rights away* is what you are saying. (emphasis added)

The Court demonstrates prejudice and makes clear that he has a biased opinion of Cross. The Court again threatens Cross with trouble:

The Court: I 'm telling you we will conduct this trial like every trial I have conducted in twenty years. We are not going to conduct it any different just because your name is Cross. I want to have - I don't want to have any trouble with you but if we have to have trouble, we will have it.

Cross again reiterates that he will not cause any trouble. Cross advised the Court that he has been denied his Sixth Amendment right to proceed pro se. Cross attempts to make a motion to the Court regarding this denial:

Mr. Cross: There is no way I can win in trouble with you. What I'm asking is, suppose *I want to make a Motion to the Court* and he doesn't want to make it. He's an appointed attorney. Something I want to say to the Court, *I want to put in the Court like my Sixth Amendment violation about counsel, I want to put that in there.* (emphases added)

The Court ignores the Sixth Amendment issue raised by Cross and attest to the competency of Cross' court appointed counsel. The Court effectively tells Cross that it will not entertain the motion regarding his sixth amendment right to proceed pro se



unless it is filed by Cross' court appointed counsel. The Court does admit that Cross knows more about his case than his attorney:

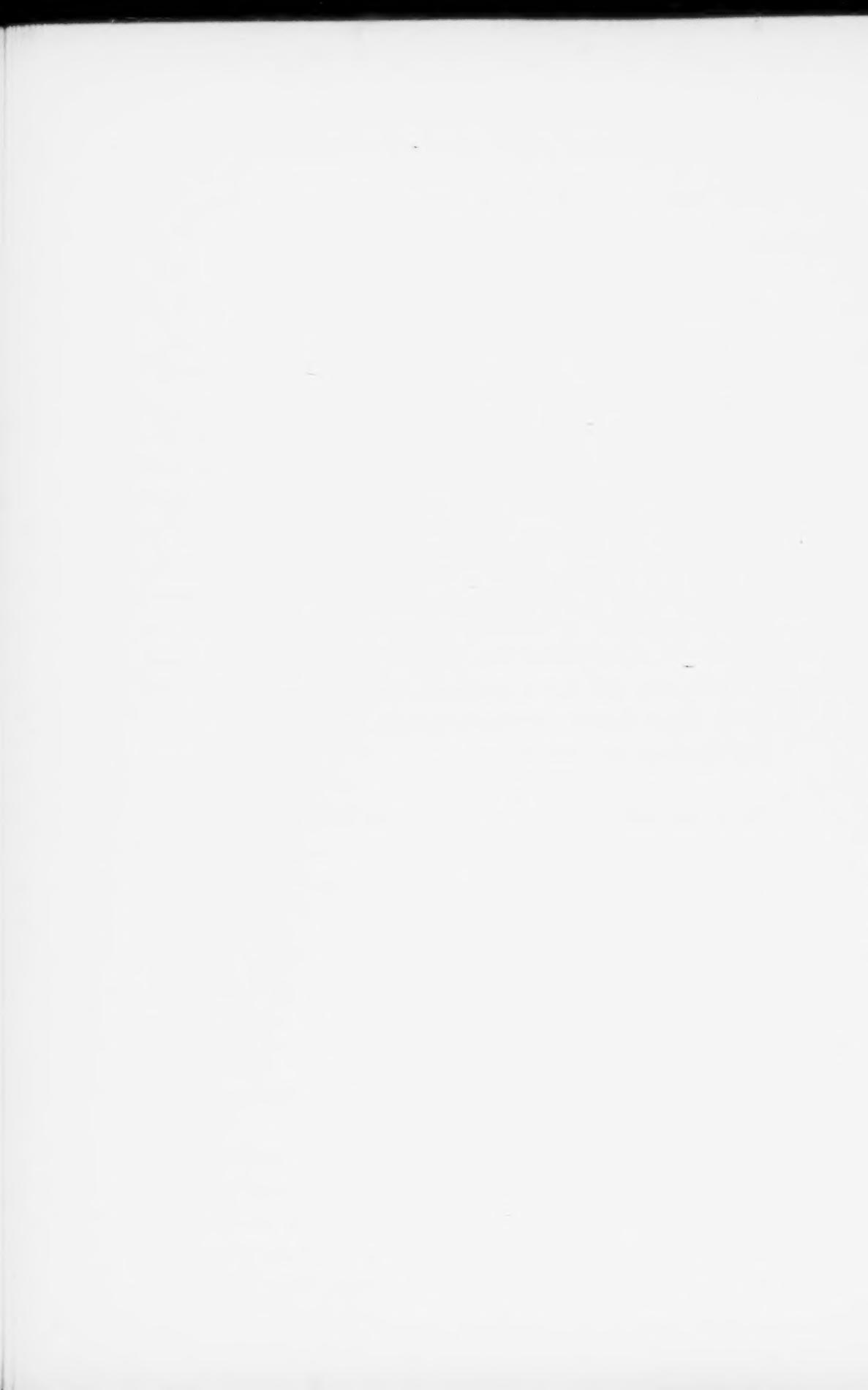
The Court: Mr. Oates is a competent attorney. If he was not, I would not have appointed him to represent you. And if he thinks a Motion should be made he will make it. If he thinks it is not in your best interest to make it, he won't make it. That's what any good lawyer would do. Just because a client wants a lawyer to do something, doesn't mean the lawyer has got to do something. Because a lawyer may decide that is not in the best interest of a client to do it. And, that's the reason you have a lawyer is because he is supposed to know more about strategy, more about how to conduct the case than you do. Sure, you know more about the facts than any lawyer would because you are the Defendant. But, the lawyer knows more about how to conduct the trial than you do. That's the reason he is a lawyer.

Cross reiterates his dissatisfaction with his attorney:

Mr. Cross: Some of these attorneys I have seen, I don't think know anything.

The Court scorns Cross for persisting with the issue and Orders Cross that the is not to address the Court again. The Court also advises Cross that he has no say over his defense:

The Court: I know; you apparently think you know more than any of them do. But that's the reason I want to have an understanding with you that Mr. Oates is the lawyer. He is the one to address me. He is the one to address the Jury and he is the one to make any objection and it's not



you. Anything you want to say to him, you will have time to say, but it's up to him to decide what objections to make, what Motions to make, what things are to be said to the Jury and *that is not your prerogative. That's his prerogative.* (emphases added)

Cross fights for his right to represent himself and again points out to the Court that he has a Sixth Amendment right to proceed pro se:

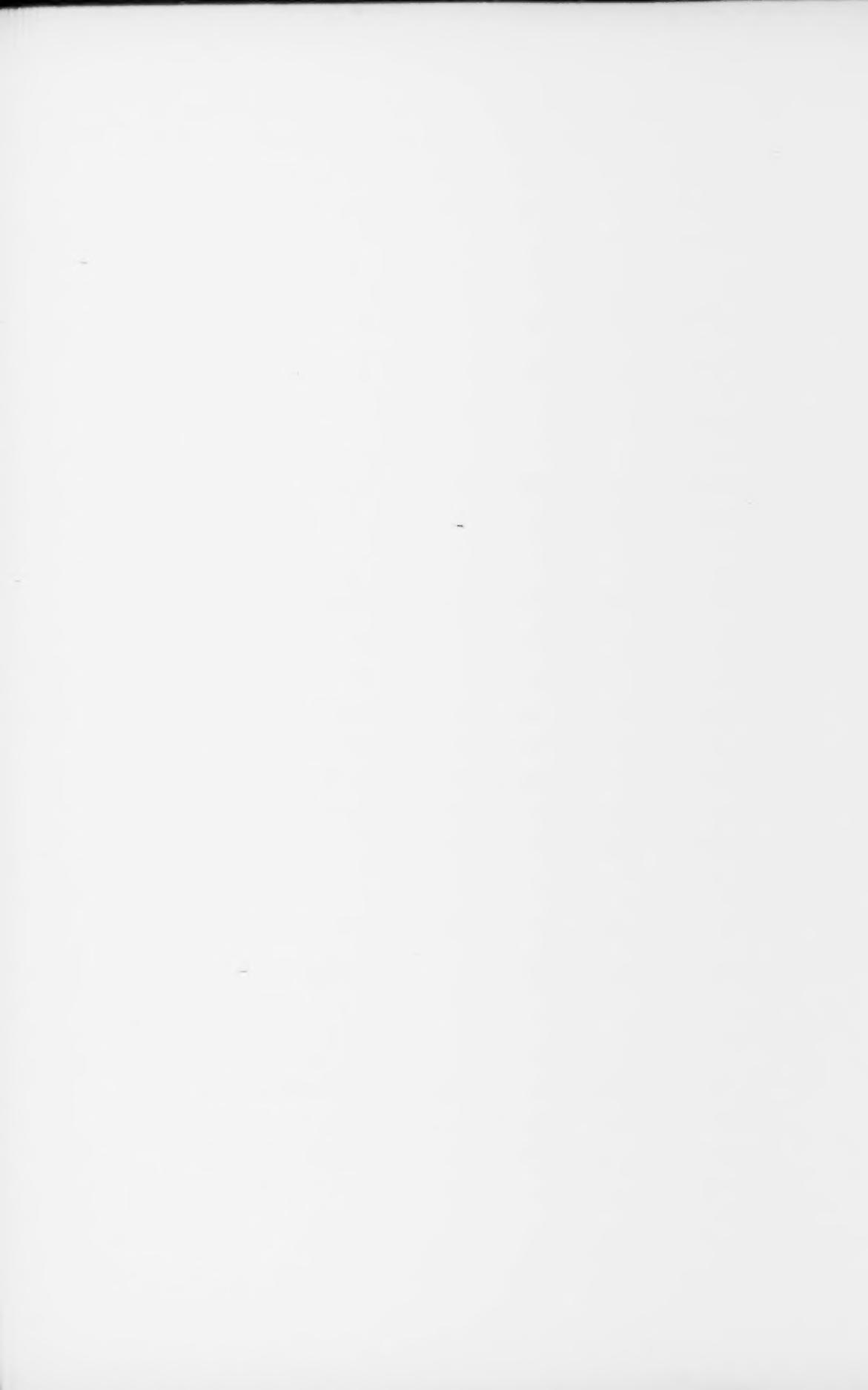
Mr. Cross: *You are taking all my Sixth Amendments away.* (emphases added)

The Court shows no concern for the raised constitutional violations:

The Court: You can interpret it any way you want to, Mr. Cross, but that is the way the case is going to be conducted. It's the way every case in the United States District Courts in the country are conducted. That's the way this case is going to be conducted.

Cross again pleads for his rights. Cross voices that his attorney is being forced on him and ask the Court if it has to be this way:

Mr. Cross: I thought a defendant had a little rights in this Courtroom. *You tell me when a lawyer says -- what a lawyer says is best for me and that's the way it's got to be.* (emphases added)



The Court ignores the issue of rights and tells Cross that [the Court] will no longer respond to him. The Court then goes on to cut short the issue:

The Court: Mr. Oates will represent to the Court what Motions he wants to make, what objections he wants to make and I will respond to them. I will not respond to you. You are to communicate with me only through your attorney.

Now that is the end of that.

You may be seated.

Alright, are we ready to go now?

REASONS FOR GRANTING THE WRIT

This Court should issue the Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit for the following reasons:

The Eleventh Circuit Court of Appeals in upholding the opinion of the District Court, and in finding that Cross waived his right to self-representation, where the record is void of any indication from Cross that he intended to waive this right and where there was no "Fareta Inquiry" conducted, has emasculated the landmark doctrine enunciated by this Court in Fareta v. California 422 U.S. 806, 835 (1975), and its progeny.

And;



because there is a conflict among the lower Courts concerning the proper application and interpretation of Faretta; and the opinion as entered, will give District Courts discretion that was not intended by this Court's previous decisions.

This Court has repeatedly held that a defendant has the right to self-representation. In Faretta v. California, 422 U.S. 806, 835 (1975), this Court stated:

In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of... counsel...." The right is currently codified in 28 U.S.C. @ 1654.

However, once right to self-representation invoked, the trial Court must conduct inquiry to determine if defendant waived right to counsel with awareness of dangers inherit of self-representation. As further noted in Faretta, 422 U.S. at 835:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbst, 304 U.S.,at 464-



465. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel.McCann, 317 U.S., at 279. (emphasis added)

As noted below, a Court's refusal to accept such a waiver is reversible error, Faretta, 422 U.S. at 836:

In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense. Accordingly, the judgment before us is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

The above colloquy established what has come to be known as the "Faretta inquiry." Admittedly, this Court has not precisely defined the scope of this inquiry. However, the clear import of Faretta is to insure that when an accused voluntarily and intelligently elects to proceed without counsel and to represent himself, he be allowed to do so. Faretta, 422 U.S. at 806. Trial Courts cannot "force a lawyer upon a defendant." Adams v. United States ex rel.McCann, 317 U.S., at 279.



Here, the Eleventh Circuit found that; Cross's initial statement that he be allowed to "*represent himself throughout this whole trial*" was clear and unambiguous and; "*were this the only evidence on the record, we would be compelled to find reversible error.*" 893 F.2d at 1298 However, the opinion of the Eleventh Circuit below found that while Cross did assert his right to self-representation, he accidentally waived that right in the *fortuitous dialogue* that followed. Id. In order to reach this conclusion the Eleventh circuit found that Cross really did not want to waive his right to counsel but rather wanted to participate as co-counsel, even though Cross was made to repeat his request to the District Court twice and both times clearly stated that he wanted to represent himself. (T.T. IV 7)

The fact that the District Court told Cross that he was not to represent himself militates against the finding of the Eleventh Circuit that Cross really wanted to be co-counsel. If Cross request was to be co-counsel then it seems to follow that the District Court would have denied the request as such. The record is void of any statement that would indicate the District Court's denial was based on a presumption that Cross had really meant to be co-counsel. In fact, the District Court failed to make known [it's] reasons for the denial.

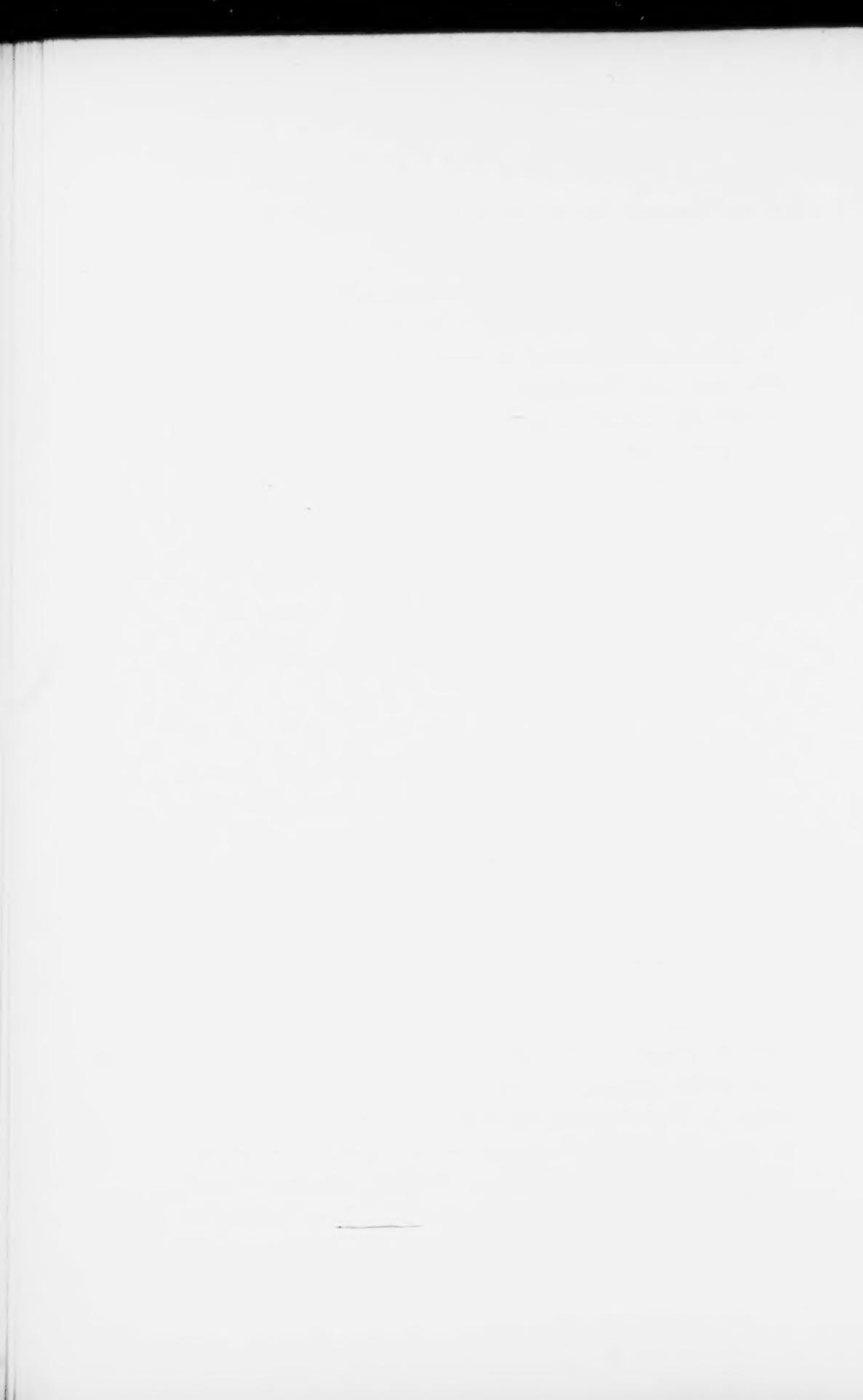


In United States v. Fant, 890 F.2d 408, 409-10 (11th Cir.1989) the Eleventh Circuit found that:

Nevertheless, the absence of a hearing will not give rise to a sixth amendment violation in those "rare cases [where] the record may support a waiver." Strozier, 871 F.2d at 997; see, e.g., Fitzpatrick, 800 F.2d at 1065-67. Here, *through the fortuity of some statements* volunteered by the defendant and elicited by defense counsel, there is sufficient evidence in the record to establish a knowing and intelligent waiver of counsel and election to proceed pro se. Cf. Greene, 880 F.2d at 1303; Stano v. Dugger, 846 F.2d 1286, 1288 (11th Cir.1988). (emphasis added)

In the case sub judice the Eleventh Circuit found that: Id. at 1298

Cross is correct that his initial statement to the court, "*I want to be allowed to represent myself through this whole trial, is sufficiently clear and unambiguous that the trial court should have held a hearing or engaged in a colloquy* to advise Cross of the risks of self-representation and elicit an express waiver of his right to counsel. See Dorman, 798 F.2d at 1366 ("defendant does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request . . . petitioner must do no more than state his request . . . unambiguously to the court so that no reasonable person can say that the request was not made."). *Were this the only evidence on the record, we would be compelled to find reversible error.* Here, however, *due solely to the fortuity of a dialogue* initiated by Cross, there is compelling evidence in the record that Cross desired to act as co-counsel, rather than proceed pro se.



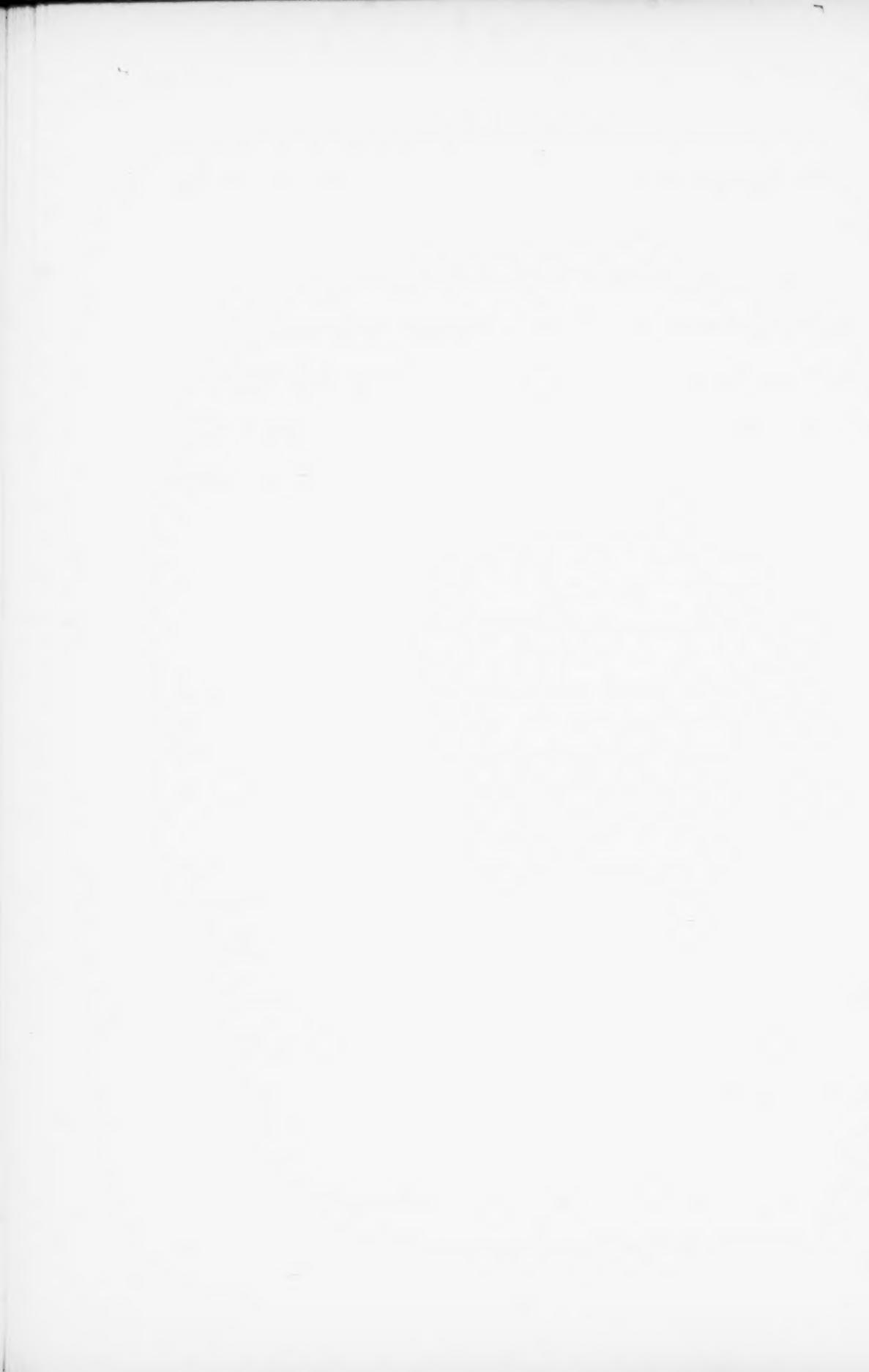
The Eleventh Circuit erred in concluding that the "*fortuity of the dialogue*" was "*initiated by Cross.*" Cross had already requested that he be allowed to represent himself and was told no. Thereafter, a dialogue between the Court and Cross ensued. If taken in context the subsequent dialogue between the District Court and Cross reveals nothing more than argument regarding Cross' continued urgings that he be allowed to represent himself. The District Court erroneously Ordered Cross that "*you are not to represent yourself.*" (T.T. IV, 7)

Before Cross made the fatal statement that:

"I am not talking about getting up and making Motions and everything else, I'm talking about I would like to address the Jury on the opening statement and talk to with the attorney and make statements to the Court and to you, your honor." (T.T. IV, 8)

the District Court had advised Cross that he could not represent himself; that there could be trouble about this request; that whether or not there is trouble will depend on Cross' pursuit of his request; that he was not to address the Court; and that he was not to represent himself.

Cross responded to the Court by stating that he would not cause any trouble; that the government had been working on the

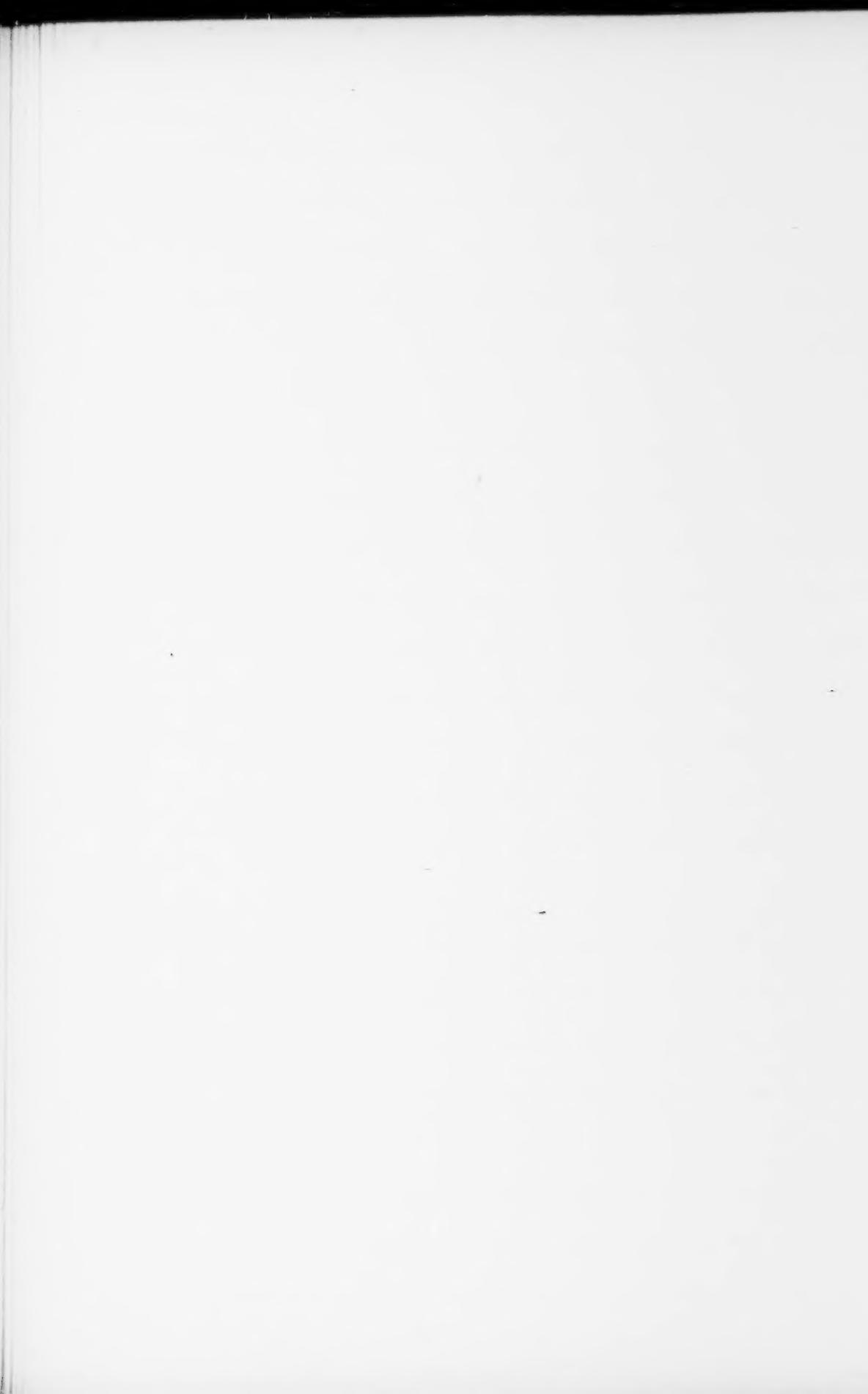


case against him along time; that he has not been able to prepare his defense or spend much time with his court appointed counsel; that his attorney does not know as much about the case as he does; that he will not be making allot of frivolous motions and such, and; that he is fighting for his life.

Cross' subsequent colloquy reinforced his desire to proceed pro se. Cross argues that his sixth amendment rights are being violated, he wants to file a Motion regarding his right to proceed pro se and he plainly tells the Court that his rights are being taken away. These statements by Cross contradict the findings of the Eleventh Circuit that Cross really wanted to be co-counsel. Further, there would be know need for the Eleventh Circuit to [ascertain] what Cross "*really meant*" had the District Court conducted a "Farettta Inquiry."

The Eleventh Circuit determined that through the "fortuity" of the dialogue, Cross waived his previously asserted right to proceed pro se. Cross submits that if he did waive his right to proceed pro se, it was indeed *fortuitously waived*.

However, the fortuity of the dialogue is an incomplete record and defeats the purpose of a Farettta hearing. This Court should not allow the lower Courts to determine that a defendant



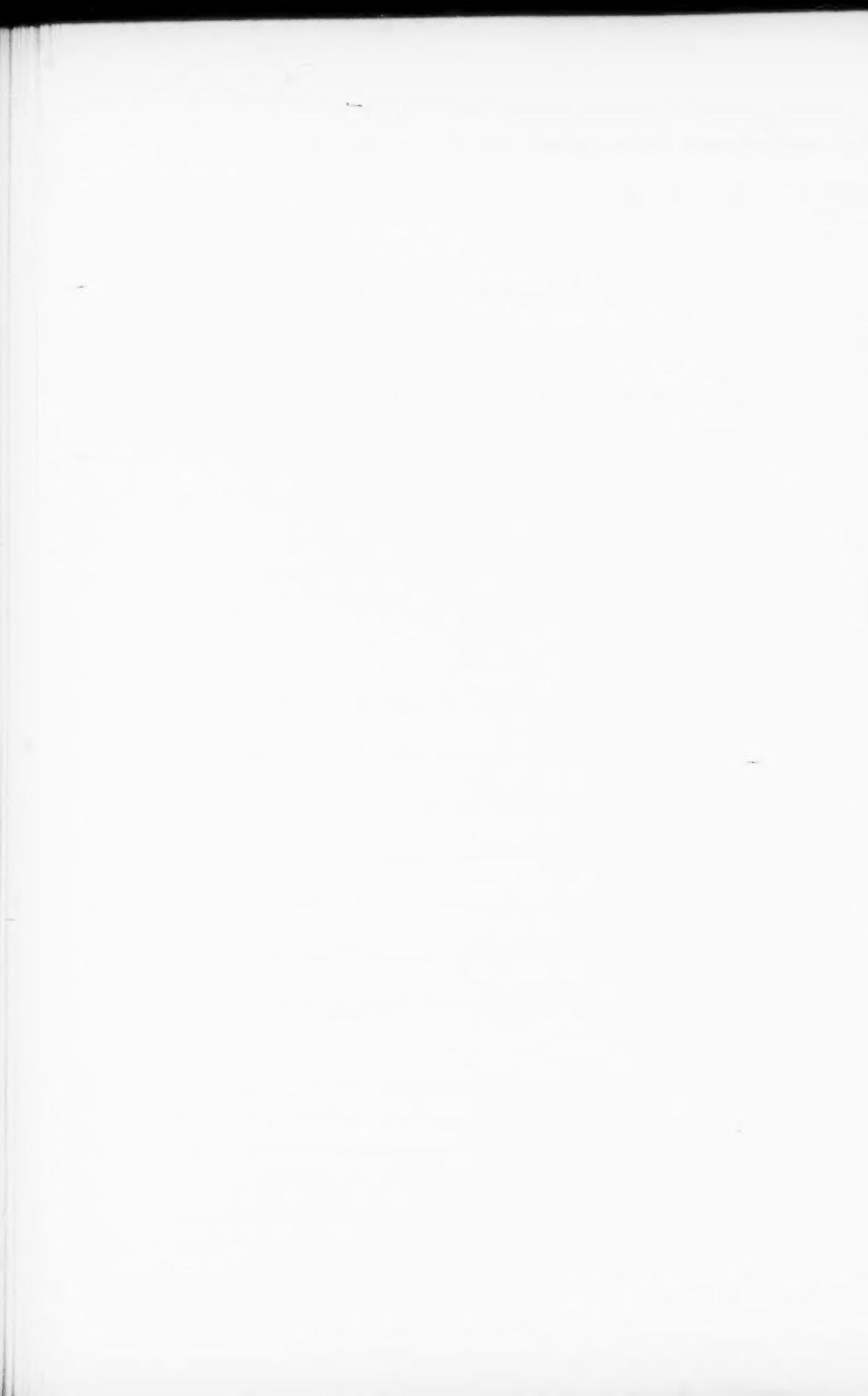
in a criminal case, has *accidentally waived* such an important right, when a simple "Faretta inquiry" will guard against this.

In fact, the last statement Cross was able to make regarding his desire to proceed pro se, clearly strikes to the heart of Faretta and even more precisely, to the heart of what the Framers of this Nations Constitution sought to prevent, as stated by Cross:

You tell me when a lawyer says -- what a lawyer says is best for me and that's the way it's got to be? (T.T. IV, 8)

To allow the lower courts to summarily dismiss an asserted right to self-representation and the Court of Appeals, with an incomplete record before them, to conclude that the defendant really meant thus and such, is simply to circumvent the purpose of Faretta, ignore the intentions of the Framers of our Constitution and undermine the Constitutional protections they intended each American to have, as noted: Faretta, Id at 832

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used at his option, in



defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

In United States v. Allen, 789 F.2d 90 (1st Cir.) the First Circuit held that the Court should advise pro se defendant of right to an attorney, right to self-representation, and "decided advantage" of competent legal counsel, cert. denied, 479 U.S. 846 (1986). In the Opinion below the Eleventh Circuit failed to determine whether Appellant would have sought to proceed pro se had he been given a "Fareta type" hearing, instead of being Ordered by the District Court that "*you are not to represent yourself.*"

The opinion of the Eleventh Circuit below correctly determined that Cross had invoked his right to self-representation.¹ However, the Court below parted with precedence in it's determination that the District Court could summarily dismiss Cross's asserted right to self-representation, without making any determination that Cross had waived that right or that there were proper grounds for denial of Cross' request. Conversely, in Fitzpatrick v. Wainwright, 800, F.2d 1057,

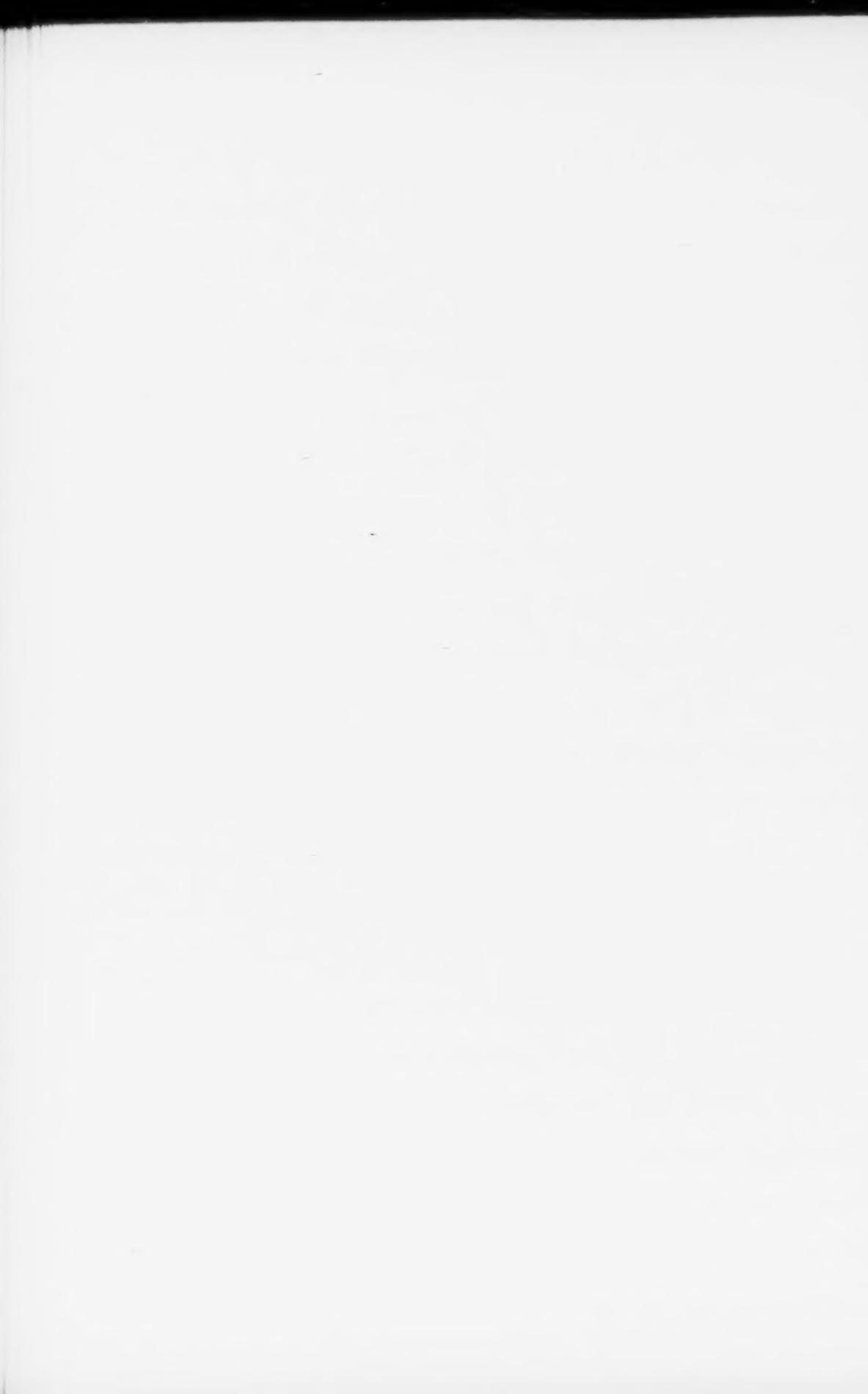
¹ The Court below determined that the trial court should have held a hearing or engaged in a colloquy to advise Cross of the risk of self-representation and elicit an express waiver of his right to counsel. Id. at 1298



1071, (11th Cir. 1986), the Court held that a hearing was mandatory to determine waiver of right to counsel and disadvantages of pro se representation.

In fact, it is common practice among the circuits to conduct some type of "Faretta" inquiry once a Defendant has informed the Court that he wished to proceed pro se. The circuits have adopted informal approaches to defining the type of Faretta inquiry a trial judge must make of the defendant. See U.S. v. Allen, 789 F.2d 90, 93 (1st Cir.) (court should advise pro se defendant of right to attorney, right to self-representation, and "decided advantage" of competent legal representation), cert denied. 479 U.S. 846 (1986); U.S. v. Mitchell, 788 F.2d 1232, 1235 (7th Cir. 1986) (judge must fully discuss with defendant dangers and disadvantages of pro se representation, but need not give "hypothetical lecture on criminal law"); U.S. v. Rylander, 714 F.2d 996, 1005 (9th Cir. 1983) (judge should discuss with defendant on record nature of charges, possible penalties, and dangers of self-representation before and at time of waiver), cert. denied. 467 U.S. 1209 (1984); Strozier v. Newsome, 871 F.2d 995, 997 n.4 (11th Cir. 1989) ("judge must explain difficulties inherent in any criminal trial including the importance of evidentiary rules," but absence of hearing not fatal, as record may support waiver).

See McMahon v. Fulcomer, 821 F.2d 934, 944 (3d Cir. 1987) (error for court to fail to conduct inquiry to determine if defendant waived right to counsel with awareness of dangers inherent in self-representation); U.S. v. Martin, 790 F.2d 1215, 1218 (5th Cir.) (factors to evaluate if waiver is knowing and intelligent include: age, education, background, experience, and whether waiver resulted from mistreatment or coercion; waiver valid when defendant stated intent to proceed pro se before arraignment, court cautioned defendant of pitfalls of self-representation, and defendant told court after caution that self-representation desired), cert denied. 479 U.S. 868 (1986); U.S. v. Grosshans, 821 F.2d 1247, 1251 (6th Cir.) (waiver valid when court specifically questioned defendant about self-representation, warned defendant of disadvantages of self-representation, and concluded defendant aware of rights but intended to proceed pro se anyway), cert denied, 484 U.S. 987 (1987); U.S. v. Balough, 820 F.2d 1485, 1487-88 (9th Cir. 1987) (before she can make knowing and intelligent waiver, defendant must be aware of (1) nature of charges against her; (2) possible penalties that could be imposed; and (3) dangers and disadvantages of self-representation); cf Blackmon v. Armontrou, 875 F.2d 164, 167 (8th Cir.) (refusal to allow defendant to proceed pro se valid when defendant found to be in dull-normal and borderline range of verbal and performance functioning), cert. denied, 110 S. Ct. 337 (1989);



U.S. v. Padilla, 819 F.2d 952, 956-57 (10th Cir. 1987) (invalid waiver presumed when court failed to conduct inquiry on record sufficient to establish defendant's knowledge and understanding of nature of charges, possible penalties, defenses, and mitigating circumstances, even if standby counsel appointed).

See also Patterson v. Illinois, 108 S. Ct. 2389, 2398 (1988) (effective waiver when "meticulous" information of sixth amendment rights and consequences of waiver presented to defendant); U.S. v. Pina, 844 F.2d 1, 6 (1st Cir. 1988) (effective waiver of counsel when court warned defendant that he would have limited access to legal materials because of his incarceration); U.S. v. West, 877 F.2d 281, 285 (4th Cir.) (defendant convicted on drug conspiracy and racketeering charges not denied effective assistance of counsel when trial court repeatedly warned of dangers of pro se representation and of charges and penalties facing defendant), cert denied. 110 S. Ct. 195 (1989).

While the right to counsel is necessary in the fair administration of our criminal justice system, the accused should not be forced to accept a lawyer he does not want. As noted below: Faretta, *supra* at 833.

The value of state appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

The opinion of the Eleventh Circuit below, if not corrected, will rob the accused of this choice, and is inconsistent with precedent case law, as well as centuries of consistent history.

CONCLUSION

The District Court clearly ignored Cross' constitutional right to self-representation and refused to inquire of him if he really wanted to represent himself and waive his right to counsel. In fact the colloquy of the Court was clearly intimidating with threats of "trouble" whenever Cross tried to explain. Yet the Court knew that Cross thought he "knew more about the case than anybody" and had good reason for wanting to represent himself.

The opinion of the Eleventh Circuit Court of Appeals contradicted a line of Eleventh Circuit cases which generally inures to the holding of a "Fareta inquiry" once a defendant has clearly invoked his right to self-representation.

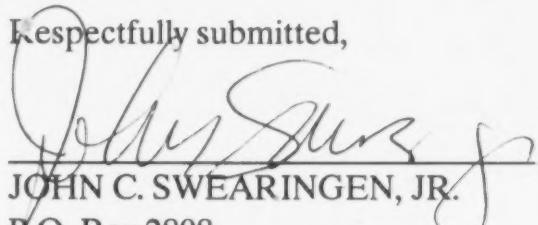


That is, the Eleventh Circuit Court of Appeals has steadfastly applied the rule in Faretta in remanding cases where there was no evidentiary hearing to determine waiver of right to counsel and disadvantages of pro se representation.

Yet in the subject case the Eleventh Circuit failed to apply its own case law to affirm the District Court's denial of Cross' Petition To Vacate Judgement and Sentence.

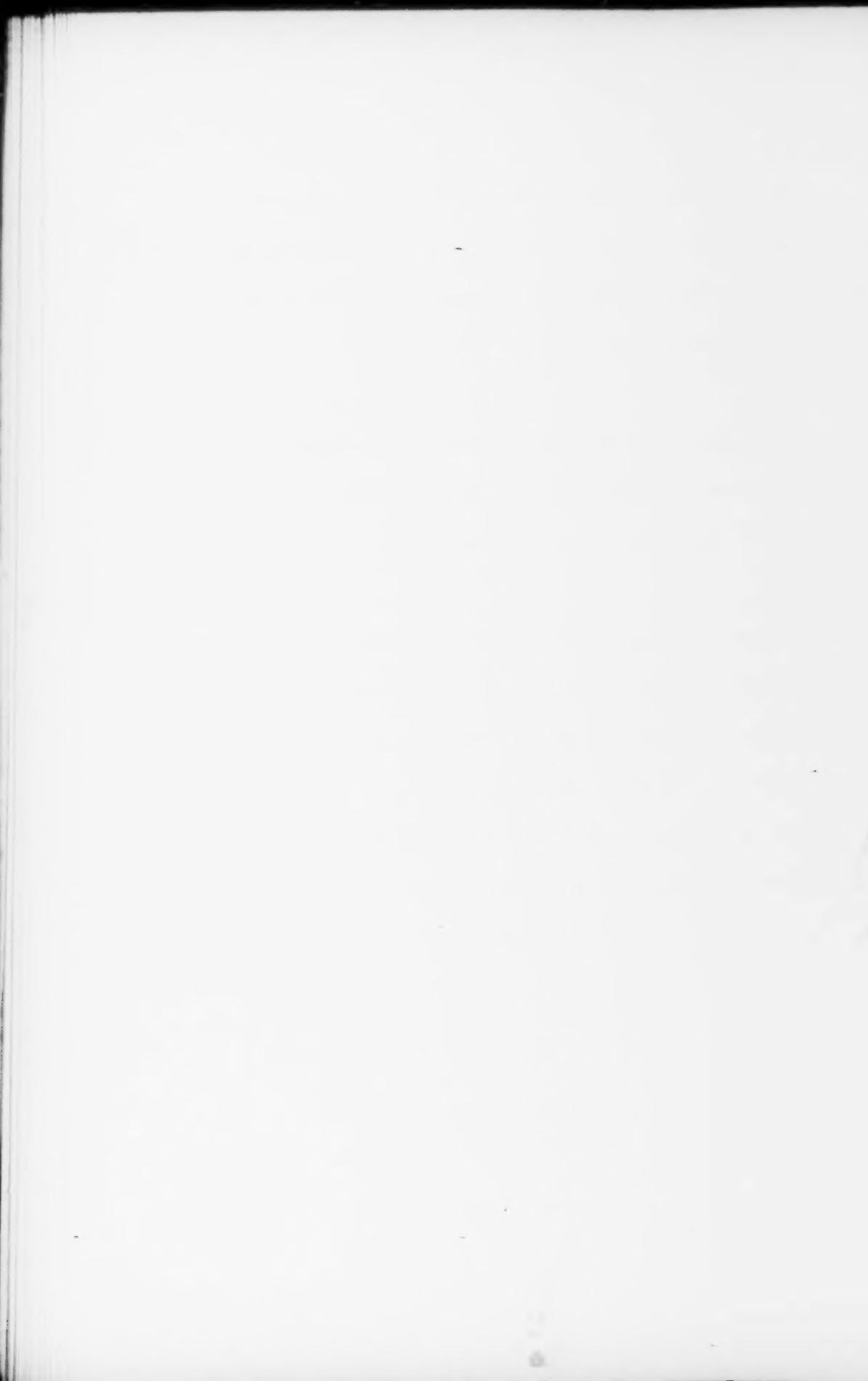
The above constitutes a denial of due process of law under the Sixth and Fifth Amendments and the Supreme Court of the United States ought to inquire into this matter more fully and grant Cross' Petition for Certiorari; and further, reverse the judgement of the Eleventh Circuit Court of Appeals, thereby making clear the intentions of this Court in Faretta.

Respectfully submitted,



JOHN C. SWEARINGEN, JR.
P.O. Box 2808
Columbus, Georgia 31902
404/323-6461

Attorney for Petitioner



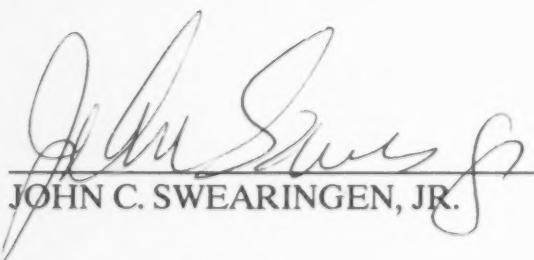
CERTIFICATE OF SERVICE

I, John C. Swearingen, Jr., hereby certify that I am a member of the bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above-styled case on Counsel for the Respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Edgar W. Ennis
United States Attorney
P.O. Box Drawer U
Macon, Georgia 31202

James M. Deichert
Special Attorney
United States Department of Justice
2002 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30303

All parties required to be served have been served this ____ day of July, 1990.



JOHN C. SWEARINGEN, JR.



APPENDIX "A"

**WILLIAM HOWARD CROSS, SR.,
Petitioner-Appellant,**

v.

**UNITED STATES OF AMERICA,
Respondent-Appellee**

No. 88-8883

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

893 F.2d 1287; 1990 U.S. App. LEXIS 1770

February 7, 1990

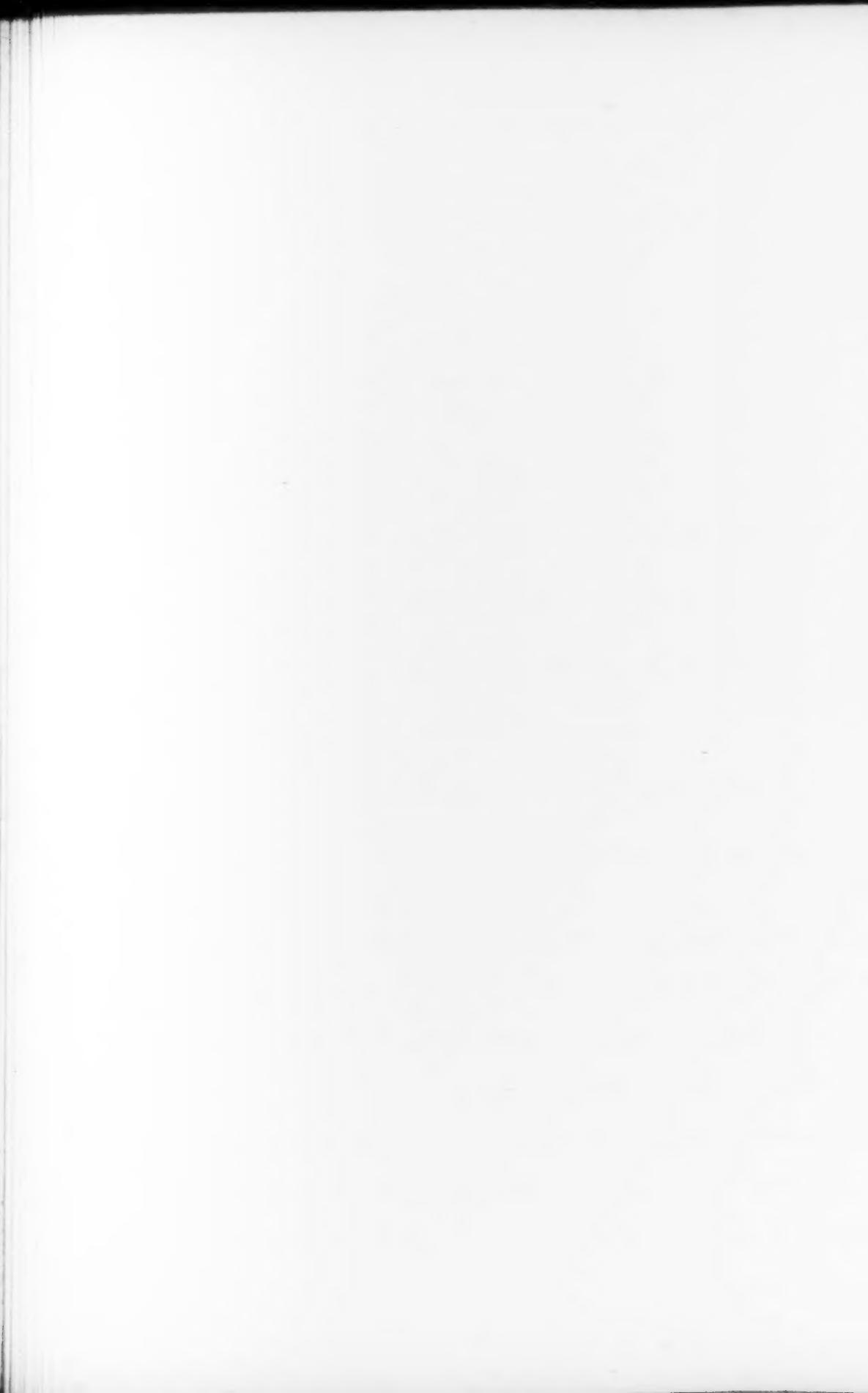
REHEARING DENIED April 10, 1990

APPEAL-STATEMENT:

Appeal from the United States District Court for the Middle District of Georgia. No. CA87-163-COL, Elliott, Judge.

COUNSEL: John C. Swearingen, Jr., CHILDS & PHILLIPS, P.C., for Petitioner-Appellant.

Robert L. Barr, Jr., U. S. Atty., Atlanta, Georgia, James M. Deichert, Special Atty., Organized Crime Strike Force, Atlanta, Georgia, Mervyn Hamburg, *1 US Dept. of Justice, Washington, D.C.



OPINION BY: KRAVITCH

OPINION:

Before KRAVITCH, Circuit Judge, HILL*, Senior Circuit Judge, and POINTER**, Chief District Judge.

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Sam C. Pointer, Jr., Chief U.S. District Judge for the Northern District of Alabama, sitting by designation.

KRAVITCH, Circuit Judge:

Appellant, William H. Cross, Sr., was convicted by a jury of various offenses in connection with a conspiracy to import and distribute methaqualone. In this appeal from the district court's denial of Cross's motion to vacate his conviction under 28 U.S.C. section 2255, Cross raises numerous grounds for relief, including the denial of his right to self-representation and ineffective assistance of counsel in failing to object to this and other errors at trial and on direct appeal. Because there is no constitutional right of a defendant to act as co-counsel, we affirm the district court's conclusion that Cross's sixth amendment rights were not violated. We also affirm the district court's summary disposition of the remainder of Cross's claims on the ground that they were



waived by Cross's failure to raise them on direct appeal.¹ We decline to excuse Cross's failure to raise these claims on direct appeal because we do not find the necessary prejudice to satisfy the Strickland² test for constitutionally ineffective assistance of counsel.

FACTS

The trial evidence revealed that in August 1980, appellant retained attorney Jerry Rylee to form a corporation. In early September 1980, Vernon Seifkes, a coconspirator purportedly acting on behalf of the corporation, made a \$30,000 down payment on a \$195,000 airplane. When the balance was not received on schedule, the seller notified Rylee and threatened repossession. Rylee notified Seifkes and the appellant of the demand for payment. Subsequently, in the bathroom of an

¹ On direct appeal, Cross raised two issues relating to the alleged discriminatory selection of grand jury foremen in the Middle District of Georgia. The Eleventh Circuit's reversal of his conviction on this ground was vacated and remanded by the Supreme Court for reconsideration in light of Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984). Subsequently, this court vacated its former judgment and affirmed the conviction. United States v. Cross, 742 F.2d 1279 (11th Cir.1984). Appellant then filed the present motion to vacate pursuant to 28 U.S.C. @ 2255 raising thirteen claims of error. While the motion was pending, Cross filed a second @ 2255 pleading raising the same issues. The motions were consolidated and the district court denied relief without a hearing. This appeal ensued.

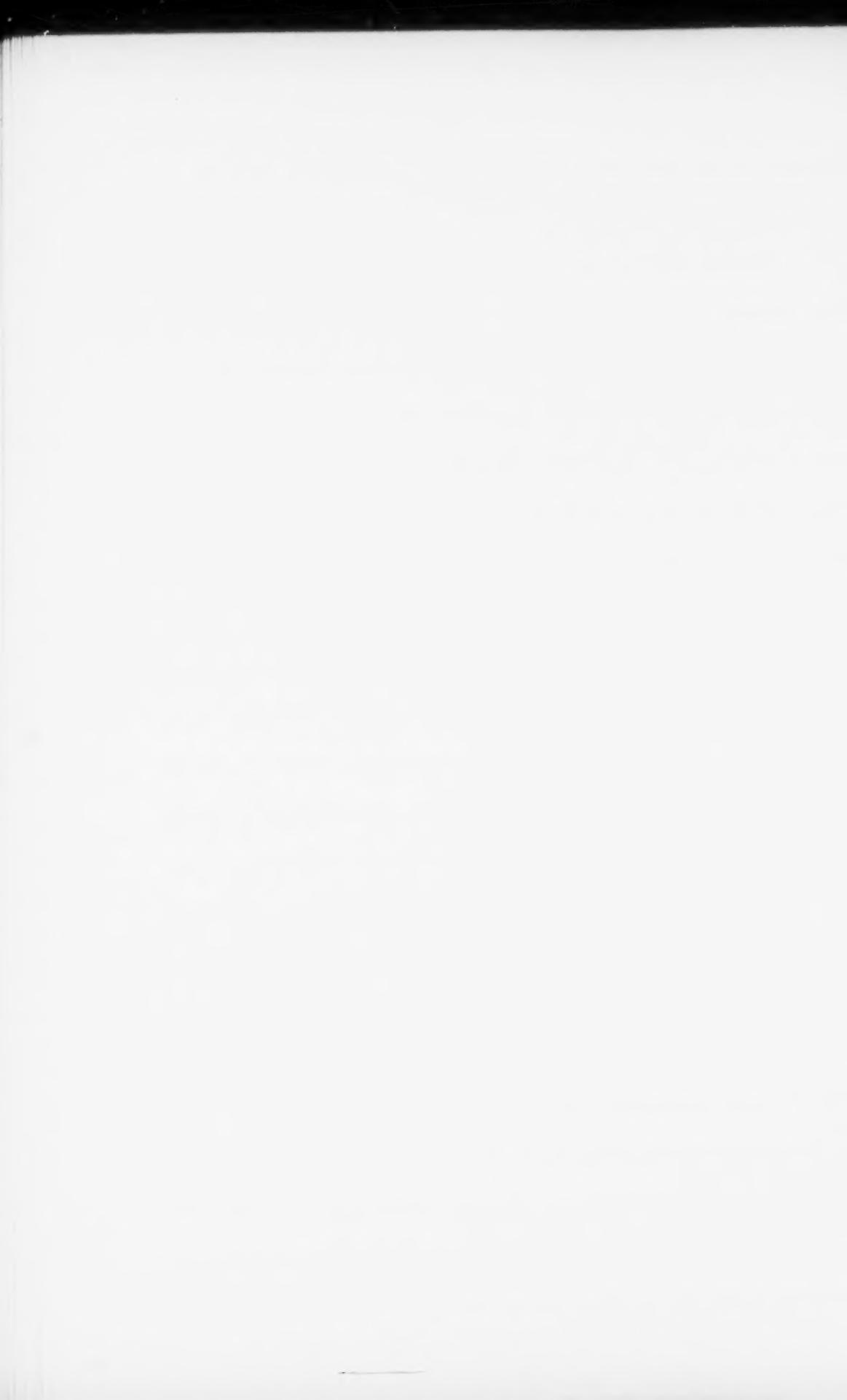
² Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).



Atlanta restaurant, appellant gave Rylee \$10,000 in cash to forward to the seller.

During this period, Seifkes, James Clark, and appellant's son, William Cross, Jr., made preparations to fly the plane to Colombia to obtain a cargo of methaqualone tablets. On the evening of October 16, 1980, appellant met with his son, Seifkes, and Clark at the Cuthbert, Georgia, airport. The four men removed all but two seats from the airplane, installed an auxiliary fuel tank, and fueled the plane. With Seifkes serving as pilot and William Cross, Jr., as passenger the plane departed.

When the airplane returned to the United States the next afternoon, it was pursued by three customs aircraft. Law enforcement officers monitoring the communications between the airplane and a radio transmitter at appellant's home overheard Seifkes and Cross, Jr. advise appellant that they were being pursued. Appellant told Seifkes to "do the best you can to lose it." Seifkes landed the plane on a crop duster airstrip south of Cuthbert airport and was arrested along with Cross, Jr. Inside the airplane officers found cartons containing 843,000 methaqualone pills. A search of appellant's home revealed instructional manuals for the automatic direction finder equipment found in the seized plane, an aeronautical map of Georgia folded to an area around Cuthbert, and a map of South America folded in a manner focusing upon the Guajira peninsula of Colombia. Appellant's



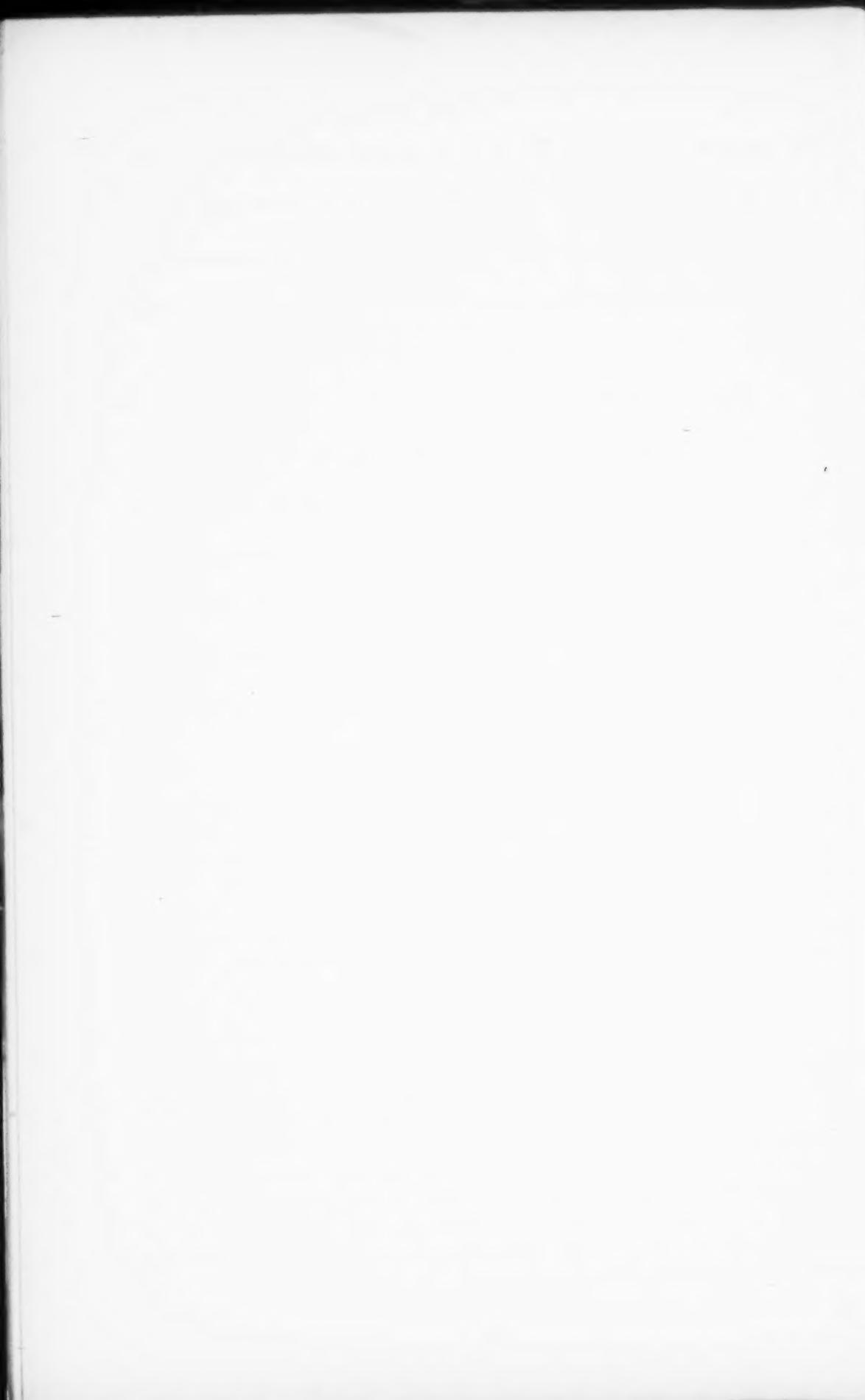
wife advised the officers that it was useless to look for the radio equipment because "it was already gone." Although radio equipment was not found, the officers discovered a coaxial cable leading from a small room in the house to a 75 to 100 foot radio tower.

DISCUSSION

On appeal Cross raises numerous points of error.³ As an initial matter, this court must determine which claims are properly before it for review.⁴ In a section 2255 federal habeas motion, a movant may not raise claims that were not presented on direct appeal unless he can show cause excusing his failure to raise the issues previously and actual prejudice resulting from the

³ Cross raises the following points of error: 1) denial of the right to self-representation; 2) ineffective assistance of counsel; 3) violation of the attorney-client privilege; 4) false testimony of Rylee at trial; 5) the prosecutor's improper comment upon appellant's failure to call certain witnesses; 6) use of alibi rebuttal testimony without prior notice to appellant; 7) failure to instruct jury on right to disagree; 8) use by trial court of pre-sentence investigation report containing false information; and 9) violation of fair cross-section requirement in grand and petit juries.

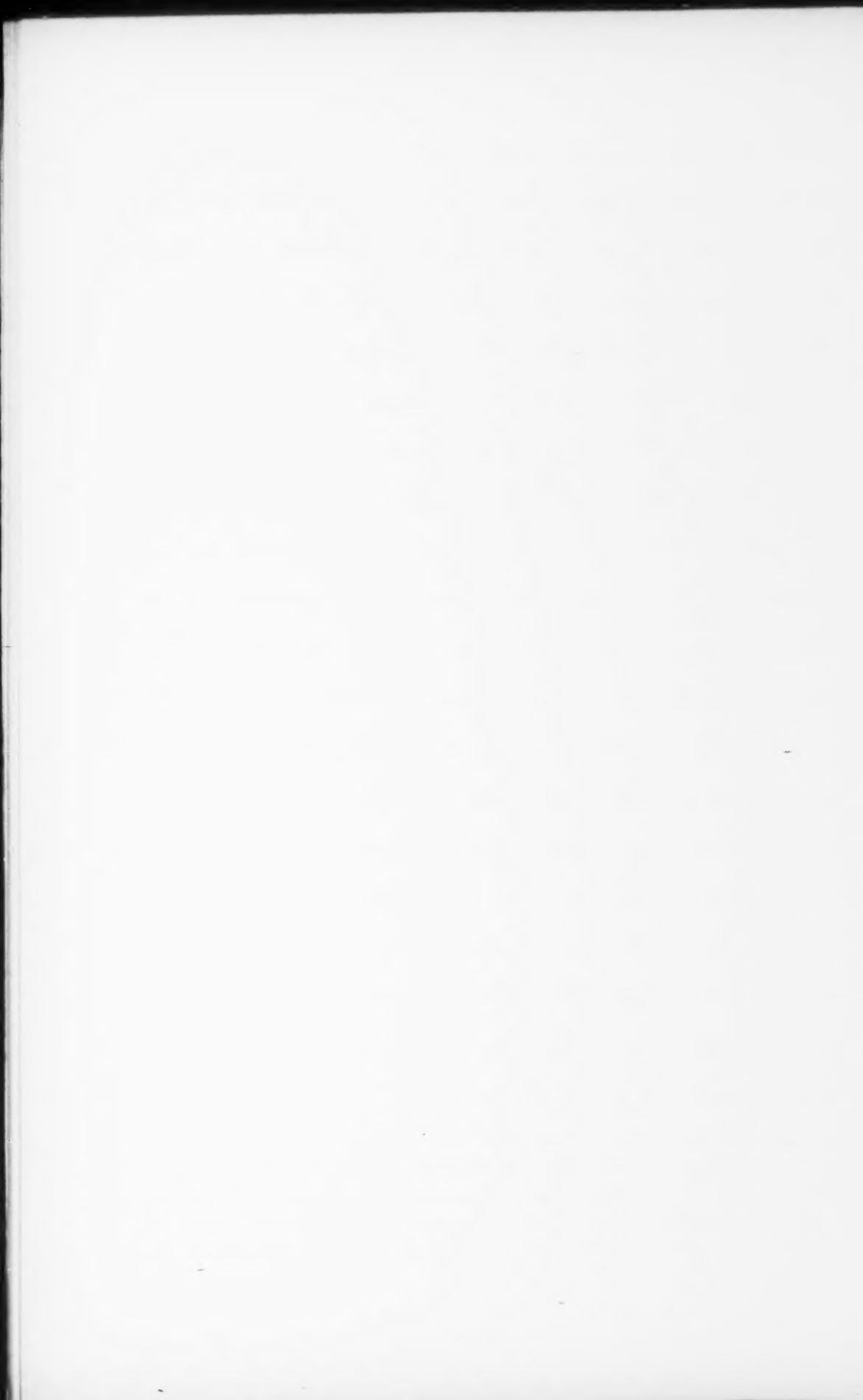
⁴ Other issues which were raised before the district court and have not been asserted on appeal are deemed abandoned. Johnson v. Wainwright, 806 F.2d 1479, 1481 n. 5 (11th Cir.1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 157 (1987). These allegations include the denial of appellant's right to compulsory process for obtaining witnesses on his behalf; a double jeopardy claim; breach of privileged marital communications; an impermissible sentence term; admission of hearsay testimony; refusal of the court to permit appellant to address it prior to sentencing; and various charges of prosecutorial misconduct other than improper comment upon appellant's failure to call certain witnesses at trial.



errors. Boschen v. United States, 845 F.2d 921, 922 (11th Cir. 1988); Garland v. United States, 837 F.2d 1563, 1565 n.4 (11th Cir. 1988) Parks v. United States, 832 F.2d 1244, 1245 (11th Cir. 1987); see United States v. Frady, 456 U.S. 152, 164, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982); Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989); Martorana v. United States, 873 F.2d 283, 284 (11th Cir. 1989); Lilly v. United States, 792 F.2d 1541 (11th Cir. 1986); Sanchez v. United States, 782 F.2d 928, 935 n. 3 (11th Cir. 1986). If the requisite cause and prejudice is not shown, we will not review the merits of the appellant's claims even upon a showing of "plain error" on the part of the lower court. Parks, 832 F.2d at 1245; see Greene, 880 F.2d at 1305.

On direct appeal, Cross challenged only the procedure by which grand jury forepersons were selected and the trial judge's denial of a motion to recuse. None of the claims raised by Cross in his present, collateral appeal were ever brought before this court on direct appeal.⁵ Therefore, with the exception of the ineffective assistance of counsel claims, Cross must establish cause and prejudice for his failure to raise these claims previously before we will look to their merits.

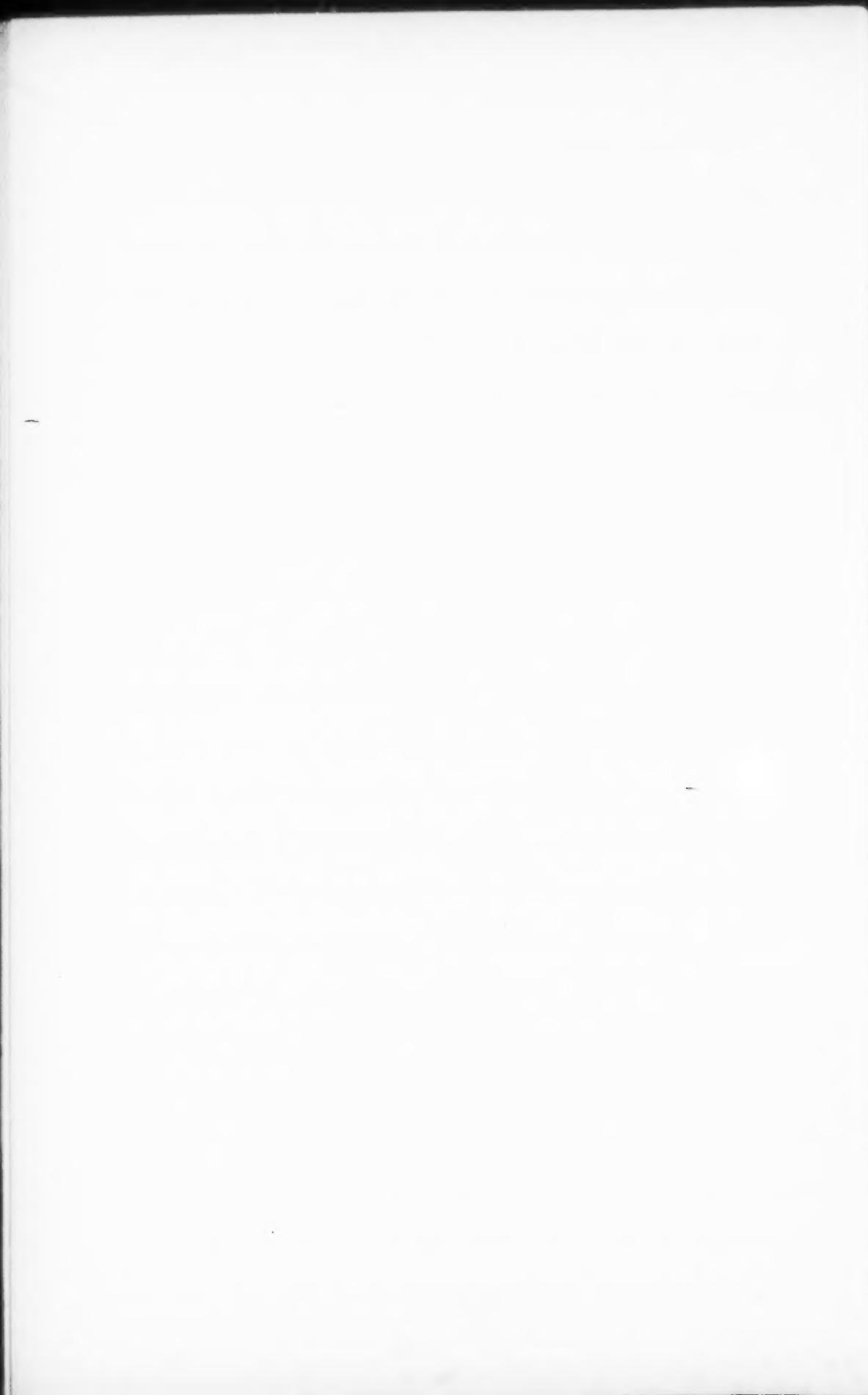
⁵ Although Cross, during trial, raised a fair cross-section challenge to the procedure by which the grand and petit jurors were selected, he did not raise this claim in his direct appeal. United States v. Cross, 708 F.2d 631, 632 n.3 (11th Cir. 1983), vacated, 468 U.S. 1212, 104 S.Ct. 3580, 82 L.Ed.2d 879 (1984).



Appellant contends that his claim that he was deprived of his right to self-representation is not procedurally barred. Cross argues that the cause for his failure to raise this claim on direct appeal is attributable to his attorney. See Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); Orazio v. Dugger, 876 F.2d 1508, 1511 (11th Cir. 1989).

Although a defendant generally bears the risk of attorney error that results in a procedural default, such error cannot be attributed to the defendant when counsel's performance is constitutionally ineffective. Murray 477 U.S. at 488, 106 S.Ct. at 2645; Orazio, 876 F.2d at 1511.

In order to establish that appellate counsel was ineffective for failing to raise the self-representation issue on direct appeal, Cross must show that his attorney's performance was deficient and that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064; Boschen, 845 F.2d at 922. Deficient performance is that which is objectively unreasonable and falls below the wide range of competence demanded of attorneys in criminal cases. Strickland, 466 U.S. at 688; 104 S.Ct. at 2064; Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987); Boschen, 845 F.2d at 922. Prejudice is established when there is a reasonable probability that the result of the proceedings would have been different had counsel not performed deficiently. Strickland, 466 U.S. at 694, 104 S.Ct. at



2068; Matire, 811 F.2d at 1435; Boschen, 845 F.2d at 922.

Because we conclude that Cross has failed to demonstrate that he was prejudiced by the performance of his trial and appellate counsel we need not address the performance prong of Strickland, 466 U.S. at 697, 104 S.Ct. at 2069; Lusk v. Dugger, 890 F.2d 332 (11th Cir.1989).

A determination of the prejudice prong of the Strickland analysis is necessarily dependent on a review of the merits of Cross's Faretta claim. See Matire, 811 F.2d at 1439 n. 8. If Cross's allegations are insufficient to show a Faretta error, then he was not prejudiced by the arguably deficient performance of counsel in failing to raise the issue on appeal. Conversely, if we find that Cross's allegations establish a Faretta violation, then we would have to find appellate counsel's performance prejudicial because it affected the outcome of the appeal. See Matire, 811 F.2d at 1439 n. 8; Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986), cert. denied, 479 U.S. 1030, 107 S.Ct. 873, 93 L.Ed.2d 827 (1987).

A trial court's evaluation of an individual's desire to represent himself is fraught with the possibility of error. Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se--and thereby depriving the individual of his right to counsel--or by denying a proper assertion of the right to



represent one-self, and thereby violating Faretta. See United States v. Fant, 890 F.2d 408, 409-10 (11th Cir.1989); Brown v. Wainwright, 665 F.2d 607, 610 (Former 5th Cir.1982) (en banc); Chapman v. United States, 553 F.2d 886, 892 (5th Cir. 1977).⁶ In recognition of the thin line that a district court must traverse in evaluating demands to proceed pro se, and the knowledge that shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record,⁷ this Court has required an individual to clearly and unequivocally assert the desire to represent himself. Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); Fant, 890 F.2d at 409; Orazio, 876 F.2d at 1512; Brown, 665 F.2d at 610.

Additionally, once the right to self-representation has been invoked initially, the trial court must conduct a hearing or engage the defendant in a colloquy to ensure that the defendant's decision is made knowingly, voluntarily, and intelligently. Fant, 890 F.2d at 409-410; Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir.), cert. denied, 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d

⁶ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as precedent all of the decisions of the former Fifth Circuit decided prior to October 1, 1981.

⁷ See Tuitt v. Fair, 822 F.2d 166, 174-75 (1st Cir.), cert. denied, 484 U.S. 945, 108 S.Ct. 333, 98 L.Ed.2d 360 (1987); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir.1965), cert. denied, 384 U.S. 1007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966).



801 (1986); Brown, 665 F.2d at 610; United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir., Unit B 1981). The purpose of this hearing is to reduce the likelihood of constitutional error by eliciting from the defendant and explicitly establishing for the record his awareness of his constitutional rights, his decision to waive the right to counsel, his awareness of the risks of proceeding pro se, and his unambiguous decision to proceed without counsel. See Fareta, 422 U.S. at 835, 95 S.Ct. at 2541; Orazio, 876 F.2d at 1512; Dorman, 798 F.2d at 1366; Brown, 665 F.2d at 610; Chaney, 662 F.2d at 1152.

Cross is correct that his initial statement to the court, "I want to be allowed to represent myself through this whole trial," is sufficiently clear and unambiguous that the trial court should have held a hearing or engaged in a colloquy to advise Cross of the risks of self-representation and elicit an express waiver of his right to counsel.⁸ See Dorman, 798 F.2d at 1366 ("defendant

⁸ Even the most cursory reading of the first pages of the trial transcript reveals an express effort by Cross to represent himself in some capacity. Following the statement by Cross's attorney that Cross wanted to present a portion of the opening statement to the jury, the following colloquy occurs:

MR. CROSS, SR.: [My attorney] said I wanted to address the Jury on the opening. I want to be allowed to represent myself through this whole trial.

THE COURT: You want what?

MR. CROSS, SR.: To represent myself.

This request was summarily denied by the trial judge.



does not need to recite some talismanic formula hoping to open the eyes and ears of the court to his request . . . petitioner must do no more than state his request . . . unambiguously to the court so that no reasonable person can say that the request was not made."). Were this the only evidence on the record, we would be compelled to find reversible error.⁹ Here, however, due solely to the fortuity of a dialogue initiated by Cross, there is compelling evidence in the record that Cross desired to act as co-counsel, rather than proceed pro se. Cf. Tuitt, 822 F.2d at 168-71 (extended colloquy revealed that defendant was unwilling to waive right to counsel despite initial request seeming to indicate desire to proceed pro se); Walker v. Loggins, 608 F.2d 731, 734 (9th Cir.1979) (whole record must establish unequivocal demand for self-representation).

The trial transcript indicates that after Cross seemingly made a request to proceed pro se, he clarified the nature of his request by explaining to the judge: "I'm not talking about getting

⁹ Cross's request was made at the eleventh hour, on the first day of the trial and moments before the beginning of opening statements. Thus, even if Cross had expressed a desire to proceed pro se, the trial court may have had adequate justification to deny the request as untimely. See Brown, 665 F.2d at 611; see also Tuitt, 822 F.2d at 171-72 (discussing untimeliness of last minute requests to secure substitute counsel); Urquhart v. Lockhart, 726 F.2d 1316, 1319 (8th Cir.1984) (same); United States v. Llanes, 374 F.2d 712, 717 (2d Cir.)(same), cert. denied, 388 U.S. 917, 87 S.Ct. 2132, 18 L.Ed.2d 1358 (1967). However, there is no evidence in the record that the trial court denied Cross's request on timeliness grounds.



up and making Motions and everything else,--I'm talking about I would like to address the Jury on the opening statement and talk with the attorney and make statements to the Court and to you, your Honor." It is apparent from this statement that Cross had no intention of waiving his right to counsel and dispensing with the assistance of his attorney. Rather, what he was seeking from the court was permission to act¹⁰ as co-counsel.

This court has held repeatedly that an individual does not have a right to hybrid representation. Julius v. Johnson, 755 F.2d 1403, 1403-04 (11th Cir.1985); United States v. Ziele, 734 F.2d 1447, 1454 (11th Cir.1984), cert. denied, 469 U.S. 1189, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985); Raulerson v. Wainwright, 732 F.2d 803, 808-09 (11th Cir.), cert. denied, 469 U.S. 966, 105 S.Ct. 366, 83 L.Ed.2d 302 (1984); United States v. Bowdach, 561 F.2d 1160, 1176 (5th Cir. 1977); United States v. Shea, 508 F.2d 82, 86 (5th Cir.), cert. denied, 423 U.S. 847, 96 S.Ct. 87, 46 L.Ed.2d 69 (1975). Rather, the decision to permit a defendant to proceed as

¹⁰ Cross's desire to act as co-counsel is further evinced by the fact that he appeared at trial with an attorney and at no time in his colloquy with the Judge expressed a desire to dismiss the attorney. Additionally, Cross's attorney initiated the issue by conveying to the court "a request by my client that he be allowed to address the Jury, a portion of my opening statement." This statement supports the inference that Cross had communicated to his attorney a desire to act as co-counsel. Cross's subsequent restatement of his attorney's request with the clarification that he wanted to represent himself "through this whole trial" is, therefore, understood in context as a request to participate as co-counsel not only during opening statements but throughout the course of the trial. Cross's subsequent explicit elaboration of his request confirms this interpretation.



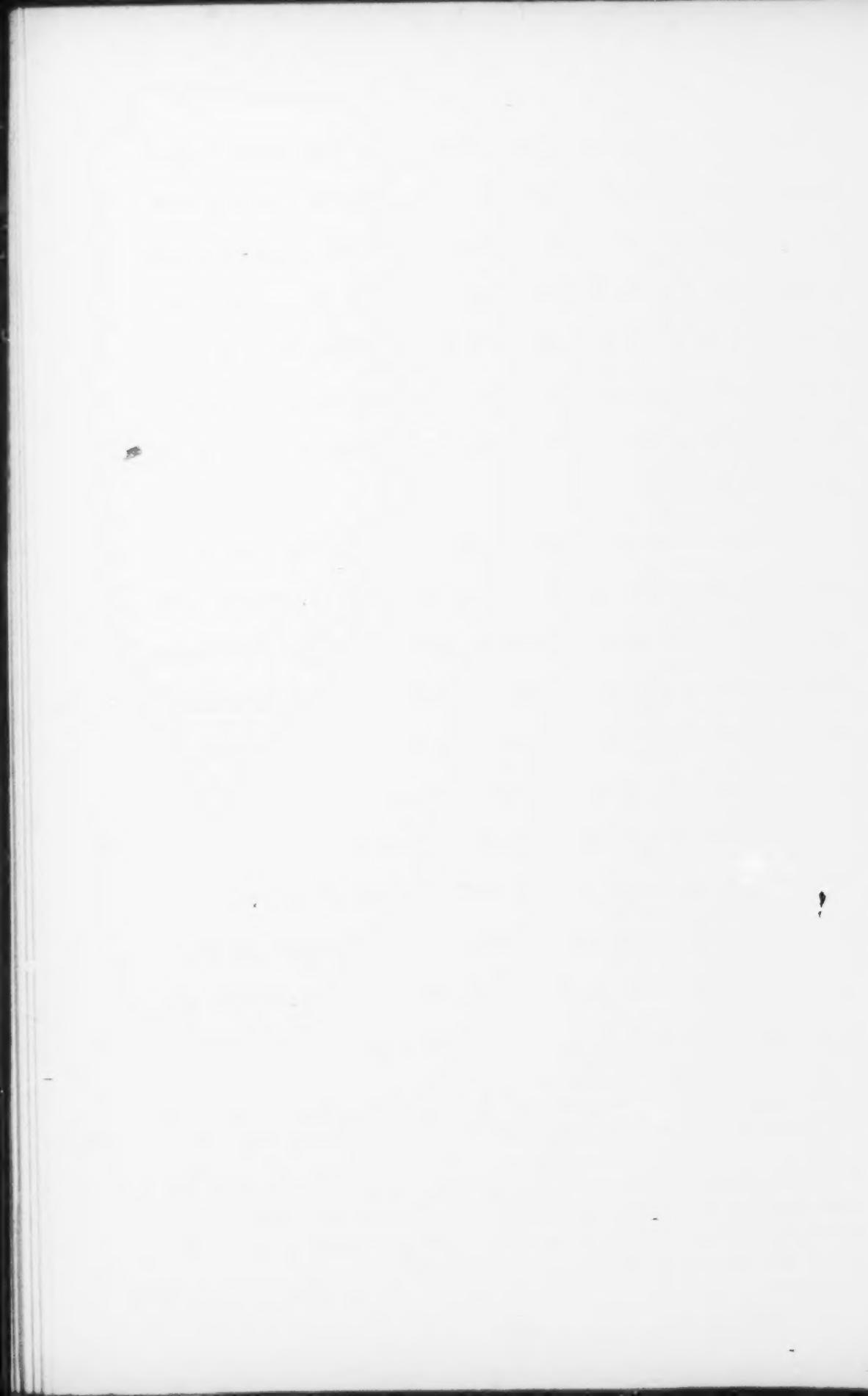
counsel rests in the sound discretion of the trial court. United States v. LaChance, 817 F.2d 1491, 1498 (11th Cir.), cert. denied, 484 U.S. 928, 108 S.Ct. 295, 98 L.Ed.2d 255 (1987); United states v. Mills, 704 F.2d 1553, 1557 (11th Cir. 1983), cert. denied, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984). Because there is no constitutional right for a defendant to act as co-counsel, the refusal of the judge to grant Cross's request does not violate the dictates of Faretta.

Absent a Faretta violation, the failure of Cross's counsel to raise the claim on direct appeal was not prejudicial and, therefore, does not establish constitutionally ineffective assistance of counsel. Moreover, Cross's inability to show a Strickland violation undermines his claim that he had cause for failing to raise his Faretta claim on direct appeal.

Appellant's remaining claims do not satisfy the cause and prejudice prerequisites for this court's review of their merits.¹¹ Even assuming that ineffective assistance of counsel on direct appeal satisfied the cause prong with respect to these claims, any error created certainly did not yield actual prejudice.¹² See, e.g.,

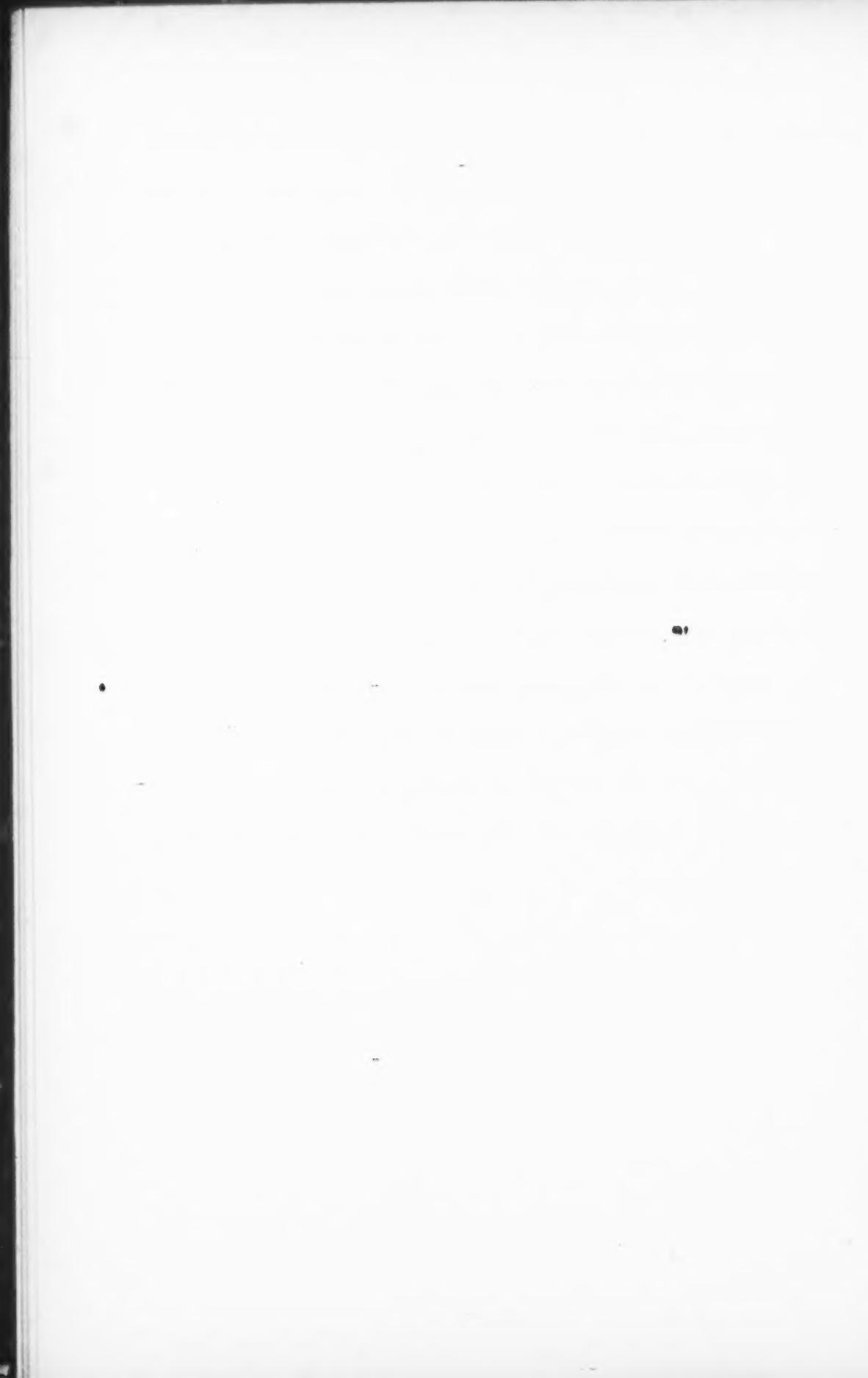
¹¹ Irrespective of the procedural bar created by appellant's failure to raise these issues on direct appeal, we also find these claims to be meritless.

¹² Similarly, we find that Cross has failed to establish his claim for constitutionally ineffective assistance of counsel because any deficiencies in representation did not yield the prejudice required to satisfy Strickland. 466 U.S. at 687, 104 S.Ct. at 2064.



Frady, 456 U.S. at 168, 102 S.Ct. at 1594 (declining to address cause prong because of confidence that there was no actual prejudice). In Frady, the Supreme Court defined prejudicial error as that which in the context of the entire trial so infused the proceeding that the resulting conviction violates due process. 456 U.S. at 169, 102 S.Ct. at 1595; see Lilly, 792 F.2d at 1544; Keel v. United States, 585 F.2d 110, 113 (5th Cir.1978) (en banc). The petitioner must show that the errors at trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Frady, 456 U.S. at 170, 102 S.Ct. at 1596. None of appellant's claims approaches this standard.

Because the allegations raised in the appellant's motion are insufficient to establish a claim for relief under section 2255, the district court did not err in denying the motion without a hearing. The judgment of the district court is, therefore, **AFFIRMED.**



APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA,

Respondent

CIVIL ACTION

vs.

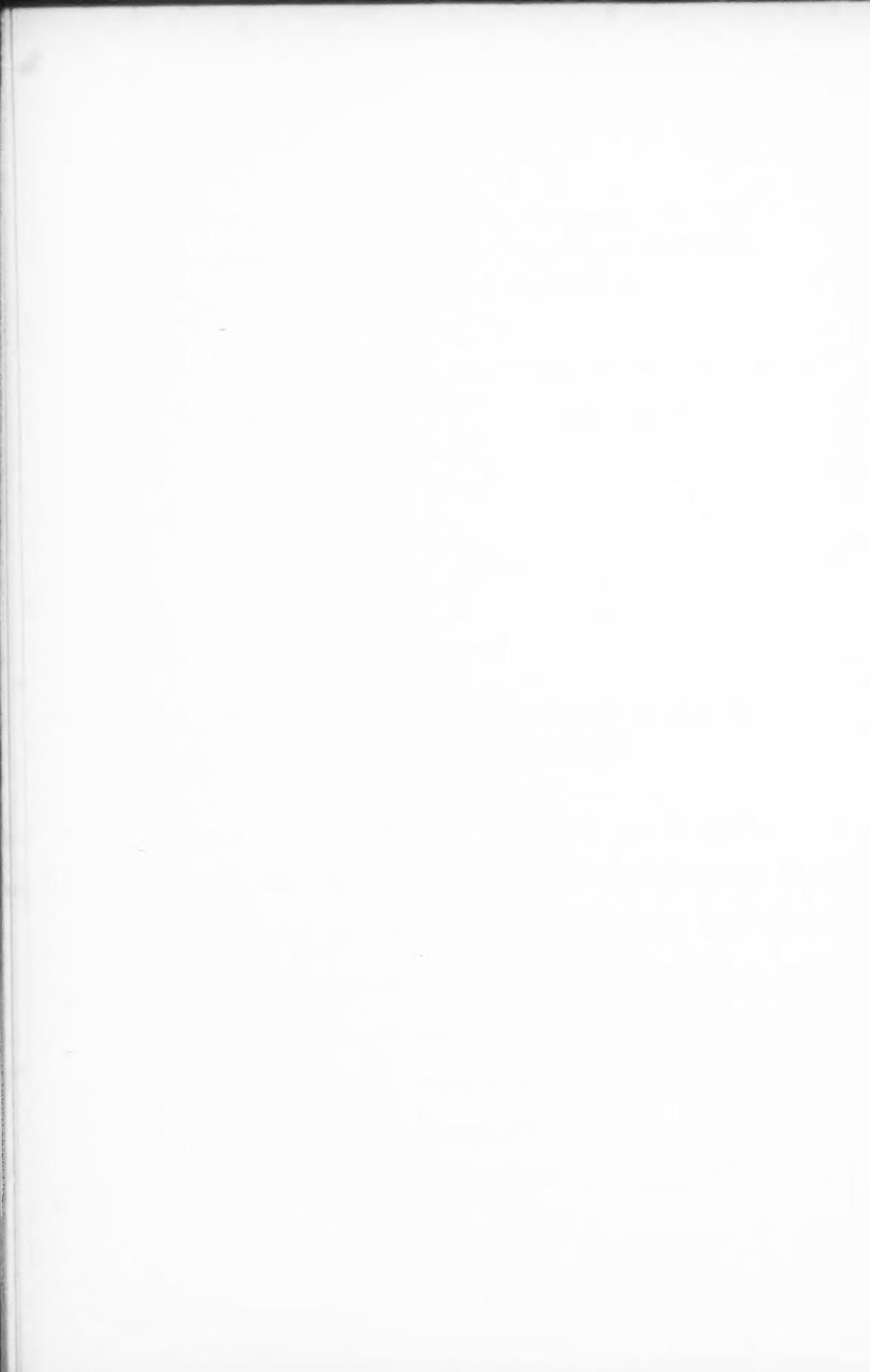
NO. 87-163-COL

WILLIAM HOWARD CROSS, SR.,

Petitioner

**ORDER ON PETITIONER'S MOTION UNDER
28 U.S.C. SECTION 2255**

The Petitioner, William Howard Cross, Sr., was convicted of a drug importation offense in September, 1981, and since that time has been serving the sentence imposed. He has now filed a motion under 28 U.S.C. Section 2255 challenging the validity of his conviction and sentence in which he raises 13 separate grounds in support of his application. The Court has given consideration to the briefs and supplementary matter filed by the Petitioner in support of his motion and to the briefs and supplementary matter filed by the United States in opposition to



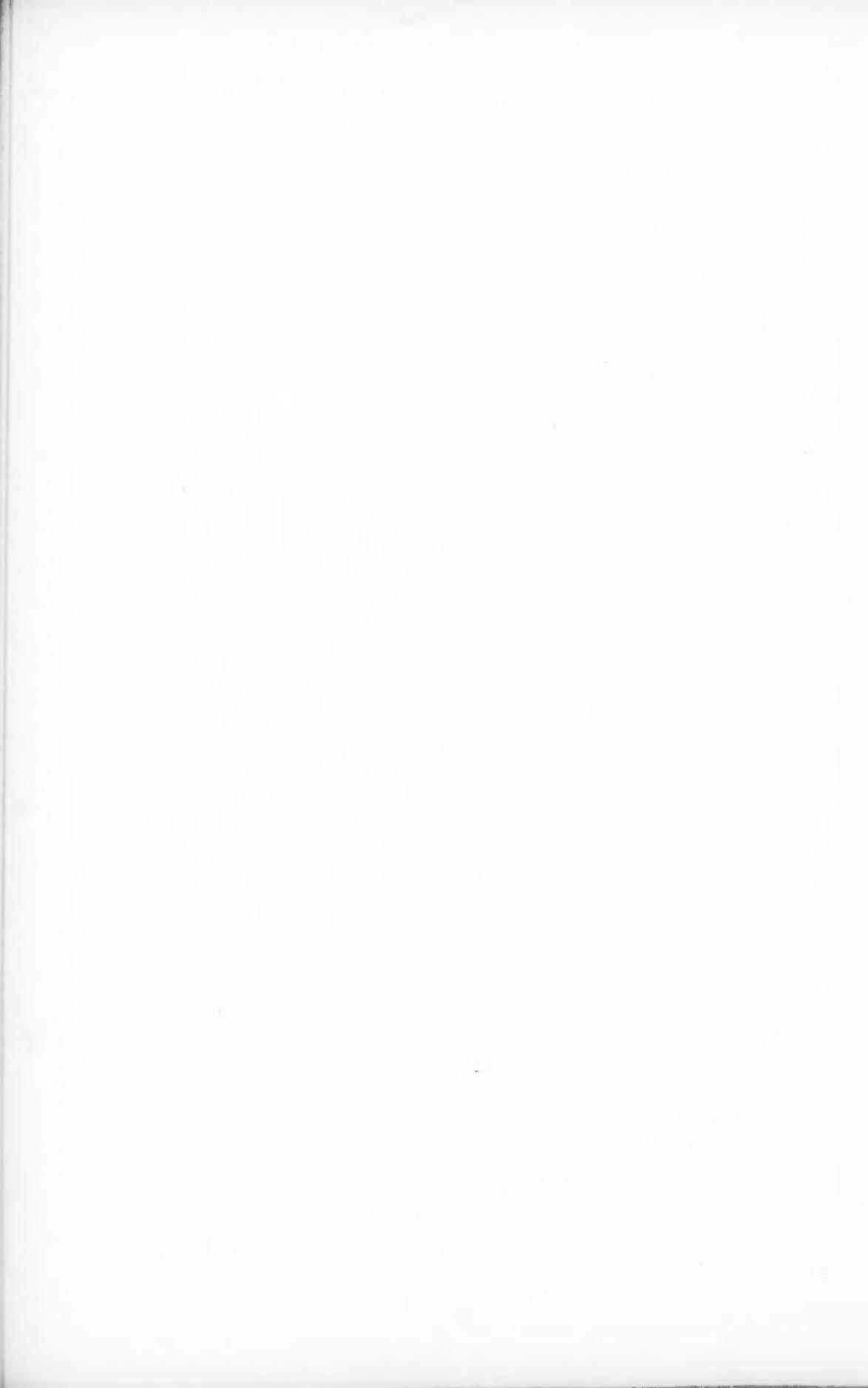
the motion and has concluded that all of the asserted grounds are without merit and that an evidentiary hearing is not required.

Insofar as the Petitioner's contention that he was denied effective assistance of counsel is concerned, it is the Court's view that the evidence of the Petitioner's guilt was so overwhelming that he could not in any event satisfy the requirements stated in Strickland v. Washington, 466 U.S. 668 (1984).

Consistant with the foregoing, the Petitioner's motion is denied.

It is SO ORDERED this 16th day of August, 1988.

J. Robert Elliott,
United States District Judge



APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

UNITED STATES OF AMERICA,

Respondent

CIVIL ACTION

vs.

NO. 87-163-COL

WILLIAM HOWARD CROSS, SR.,

Petitioner

MEMORANDUM AND ORDER ON PETITIONER'S MOTION FOR RECONSIDERATION AND FOR SUPPLEMENTATION OF THE RECORD

The habeas corpus Petitioner above identified was convicted in this court on a drug-related offense in 1981 and he continues to serve the sentence imposed.

Prior to the Petitioner's trial he filed pretrial motions challenging the composition of the grand jury as well as the petit jury under The Jury Selection and Service Act, 28 U.S.C. 1861, et seq., and in connection therewith filed a motion to dismiss the indictment. After conducting an evidentiary hearing the Court denied the motion to dismiss. He was convicted in September 1981 and thereafter appealed his conviction. In his appeal he did



not challenge the grand and petit jury selection procedures. United States v. Cross, 708 F.2d 631 (1983).

The Petitioner has consolidated two habeas corpus applications, one identified as Civil Action 85-116, which did not raise the jury selection issue, and Civil Action 87-163, which did not raise the jury selection issue, and Civil Action 87-163 in which the question is raised. The Petitioner initially presented no facts in support of his assertion made in Civil Action 87-163 that the "6th Amendment and Statutory Law [28 U.S.C. section 1861, et seq.] . . ." had been violated. The Court on August 16, 1988, entered an order denying the relief sought, and the Petitioner has now filed a motion for reconsideration of the Court's order and has supplemented the record by filing a statement of Roger Friedman, which includes a statistical analysis of the grand and petit jury lists in the Middle District of Georgia using 1980 census data, and the Court has allowed this supplementation, the United States opposing the Petitioner's motion for reconsideration.

It is the Court's view that the Petitioner's application for relief under the Sixth Amendment as well as The Jury Selection Act is untimely and should be dismissed. As above noted, the Petitioner raised this issue in 1981. After filing an unsubstantiated allegation in his habeas corpus petition in December 1987 and setting out additional factual matters in the present motion for



reconsideration, he has given no reason for the delay of almost seven years.

The Jury Selection and Service Act authorizes access by Defendants to records concerning the composition of jury wheels and the selection of the grand jury and petit jury panels to allow allegations of discrimination in the selection process to be raised and adjudicated prior to trial, and it has been held that "violations which are discovered or could have been discovered during this investigatory stage must be alleged in the motion and sworn statement, and failure to do so will preclude their assertion either at the evidentiary hearing or at any later point." United States v. Bearden, 659 F.2d 590, 597 (5th Cir. 1981)

Since the Petitioner knew of the existence of the claims now made at the time of his direct appeal, but did not present them, he has waived all claims to relief on this basis. Sanders v. United States, 373 U.S. 1 (1963).

Finally, the Petitioner has failed to carry his burden of proof to establish a violation of the Sixth Amendment and The Jury Selection Act. The same standard exists under applications for both constitutional and statutory relief on the grounds that the grand jury and/or petit jury did not represent a fair cross-section of the community. United States v. Rodriguez, 776 F.2d 1509 (11th Cir. 1985). To establish a prima facie case that a "distinctive group" is underrepresented the Petitioner must

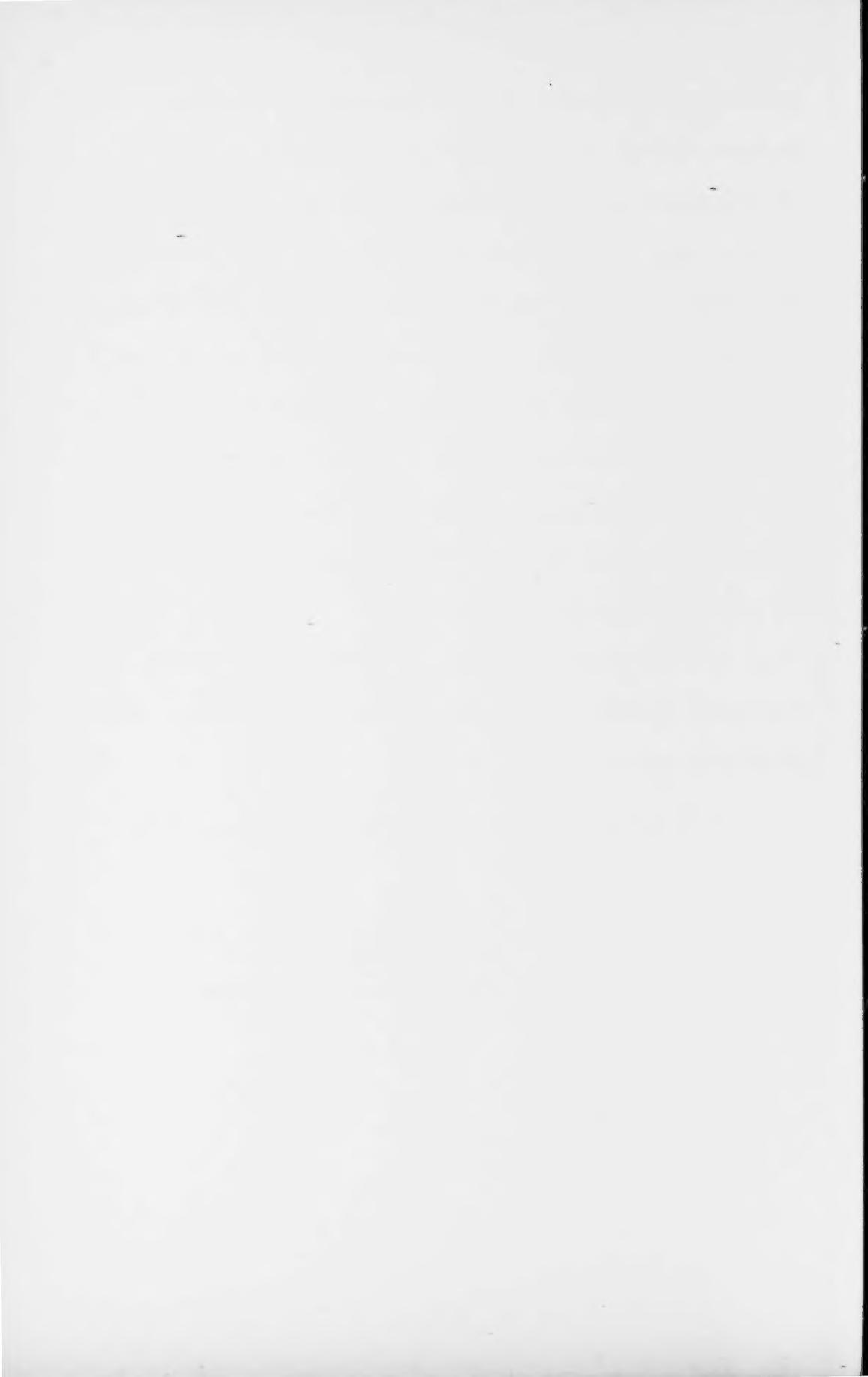


establish a 10% absolute disparity between the percentage of the distinctive group on the qualified jury wheel and the percentage of the group among the population eligible for jury service in the division. Rodriguez, supra at 1511. The submissions which have been made by the Petitioner do not satisfy this 10% absolute disparity standard, and the Petitioner's inability to establish a violation of the 10% absolute disparity standard constitutes a failure of proof and warrants the dismissal of his application for relief. United States v. Maldonado, 849 F.2d 522 (11th Cir. 1988), Rodriguez, supra at 1511, and United States v. Pepe, 747 F.2d 632 at 648-49 (11th Cir. 1984).

For the reasons stated above the Court denies the Petitioner's motion for reconsideration of its previous order denying the relief sought.

IT IS SO ORDERED this 18th day of November, 1988.

J. Robert Elliott,
United States District Judge



APPENDIX "D"

Amendment Six **to the United States Constitution**

"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."



APPENDIX E

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 88-8883**

**FILED APRIL 10, 1990
MIGUEL J. CORTEZ
CLERK**

WILLIAM HOWARD CROSS,

Petitioner, Appellant,

versus

Respondent-Appellee.

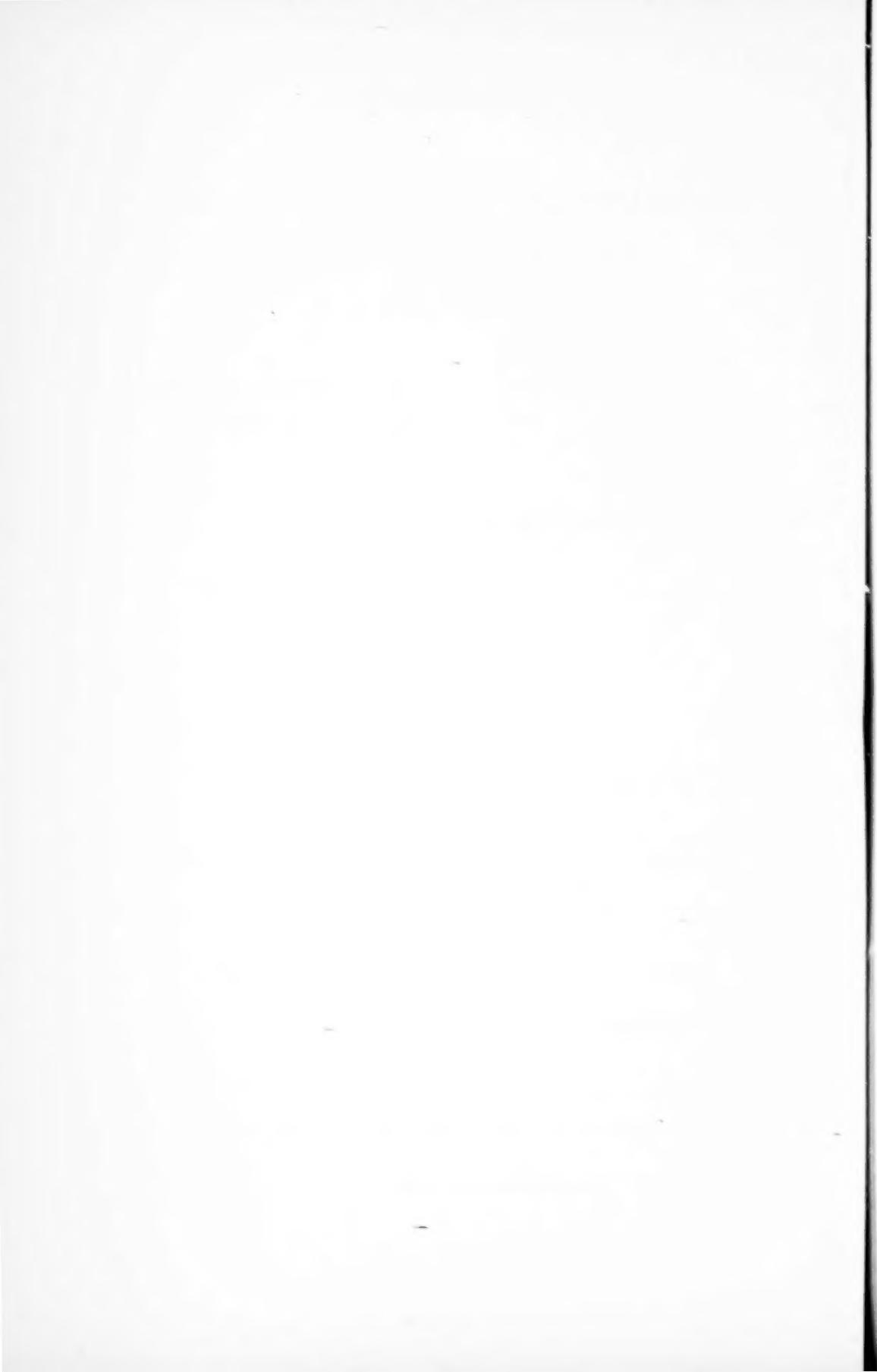
UNITED STATES OF AMERICA,

**Appeal for the United States District Court for the
Middle District of Georgia**

**ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC**

(Opinion _____, 11 Cir., 198____, ____ F.2d ____)

Before KRAVITCH, Circuit Judge, Hill*, Senior Circuit Judge,
and POINTER**, Chief District Judge.



The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35 Federal Rules Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are Denied.

ENTERED FOR THE COURT:

PHYLLIS KRAVITCH,
United States Circuit Judge

* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Sam C. Pointer, Jr., Chief U.S. District Judge for the Northern District of Alabama, sitting by designation.